

PART 1

FEDERAL ACQUISITION REGULATIONS SYSTEM

Federal Acquisition System Vision, Standards, and Strategies

The Vision

Deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives. View best value from a broad perspective, balancing the many competing interests in the System. The result is a system which works better and costs less.

Standards for Performance

1. Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service.
2. Minimize administrative operating costs.
3. Conduct business with integrity, fairness, and openness.
4. Fulfill public policy objectives.

Strategies for Meeting System Standards

- Shift the focus from “risk avoidance” to “risk management.”
- Forecast requirements and develop long-range plans for accomplishing them.
- Team with other participants in the acquisition process.
- Empower participants to make decisions within their area of responsibility.
- Encourage innovation and local adaptation where uniformity is not essential.
- If a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, assume that the strategy, practice, policy or procedure is a permissible exercise of authority.
- Communicate with the commercial sector as early as possible in the acquisition cycle to help the Government determine the capabilities available in the commercial marketplace.

- Foster cooperative relationships between the Government and its contractors consistent with the Government's overriding responsibility to the taxpayers.
- Maximize the use of commercial products and services in meeting Government requirements.
- Select contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform.
- Promote competition.
- Provide training, professional development, and other resources necessary for maintaining and improving the knowledge, skills, and abilities for all Government participants on the Team, both with regard to their particular area of responsibility within the System, and their respective role as a team member. The contractor community is encouraged to do likewise.

FAC 90-29 amended FAR Subpart 1.1 by redesignating sections 1.102 through 1.105 as 1.103 through 1.106 and adding new sections 1.102 through 1.102-4 to read as follows:

1.102 Statement of Guiding Principles for the Federal Acquisition System.

(a) The vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives. Participants in the acquisition process should work together as a team and should be empowered to make decisions within their area of responsibility.

(b) The Federal Acquisition System will—

(1) Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service by, for example—

(i) Maximizing the use of commercial products and services;

(ii) Using contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform; and

(iii) Promoting competition;

(2) Minimize administrative operating costs;

(3) Conduct business with integrity, fairness, and openness; and

(4) Fulfill public policy objectives.

(c) The Acquisition Team consists of all participants in Government acquisition including not only representatives of the technical, supply, and procurement communities but also the customers they serve, and the contractors who provide the products and services.

(d) The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer's needs. In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.

1.102-1 Discussion.

(a) *Introduction.* The statement of Guiding Principles for the Federal Acquisition System (System) represents a concise statement designed to be user-friendly for all participants in Government acquisition. The following discussion of the principles is provided in order to illuminate the meaning of the terms and phrases used. The framework for the System includes the Guiding Principles for the System and the supporting policies and procedures in the FAR.

(b) *Vision.* All participants in the System are responsible for making acquisition decisions that deliver the best value product or service to the customer. Best value must be viewed from a broad perspective and is achieved by balancing the many competing interests in the System. The result is a system which works better and costs less.

1.102-2 Performance standards.

(a) *Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service.*

(1) The principal customers for the product or service provided by the System are the users and line managers, acting on behalf of the American taxpayer.

(2) The System must be responsive and adaptive to customer needs, concerns, and feedback.

Implementation of acquisition policies and procedures, as well as consideration of timeliness, quality, and cost throughout the process, must take into account the perspective of the user of the product or service.

(3) When selecting contractors to provide products or perform services, the Government will use contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform.

(4) The Government must not hesitate to communicate with the commercial sector as early as possible in the acquisition cycle to help the Government determine the capabilities available in the commercial marketplace. The Government will maximize its use of commercial products and services in meeting Government requirements.

(5) It is the policy of the System to promote competition in the acquisition process.

(6) The System must perform in a timely, high quality, and cost-effective manner.

(7) All members of the Team are required to employ planning as an integral part of the overall process of acquiring products or services. Although advance planning is required, each member of the Team must be flexible in order to accommodate changing or unforeseen mission needs. Planning is a tool for the accomplishment of tasks, and application of its discipline should be commensurate with the size and nature of a given task.

(b) *Minimize administrative operating costs.* (1) In order to ensure that maximum efficiency is obtained, rules, regulations, and policies should be promulgated only when their benefits clearly exceed the costs of their development, implementation, administration, and enforcement. This applies to internal administrative processes, including reviews, and to rules and procedures applied to the contractor community.

(2) The System must provide uniformity where it contributes to efficiency or where fairness or predictability is essential. The System should also, however, encourage innovation, and local adaptation where uniformity is not essential.

(c) *Conduct business with integrity, fairness, and openness.* (1) An essential consideration in every aspect of the System is maintaining the public's trust. Not only must the System have integrity, but the actions of each member of the Team must reflect integrity, fairness, and openness. The foundation of integrity within the System is a competent, experienced, and well-trained, professional workforce. Accordingly, each member of the Team is responsible and accountable for the wise use of public resources as well as acting in a manner which maintains the public's trust. Fairness and openness require open communication among team members, internal and external customers, and the public.

(2) To achieve efficient operations, the System must shift its focus from "risk avoidance" to one of "risk management." The cost to the taxpayer of attempting to eliminate all risk is prohibitive. The Executive Branch will accept and manage the risk associated with empowering local procurement officials to take independent action based on their professional judgment.

(d) *Fulfill public policy objectives.* The System must support the attainment of public policy goals adopted by the Congress and the President. In attaining these goals, and in its overall operations, the process shall ensure the efficient use of public resources.

1.102-3 Acquisition Team.

The purpose of defining the Federal Acquisition Team (Team) in the Guiding Principles is to ensure that participants in the System are identified--beginning with the customer and ending with the contractor of the product or service. By identifying the team members in this manner, teamwork, unity of purpose, and open communication among the members of the Team in sharing the vision and achieving the goal of the System are encouraged. Individual team members will participate in the acquisition process at the appropriate time.

1.102-4 Role of the Acquisition Team.

(a) Government members of the Team must be empowered to make acquisition decisions within their areas of responsibility, including selection, negotiation, and administration of contracts consistent with the Guiding Principles. In particular, the contracting officer must have the authority to the maximum extent practicable and consistent with law, to determine the application of rules, regulations, and policies, on a specific contract.

(b) The authority to make decisions and the accountability for the decisions made will be delegated to the lowest level within the System, consistent with law.


(c) The Team must be prepared to perform the functions and duties assigned. The Government is committed to provide training, professional development, and other resources necessary for maintaining and improving the knowledge, skills, and abilities for all Government participants on the Team, both with regard to their particular area of responsibility within the System, and their respective role as a team member. The contractor community is encouraged to do likewise.

(d) The System will foster cooperative relationships between the Government and its contractors consistent with its overriding responsibility to the taxpayers.

(e) The FAR outlines procurement policies and procedures that are used by members of the Acquisition Team. If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, Government members of the Team should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting the Team to innovate and use sound business judgment that is otherwise consistent with law and within the limits of their authority.

PART 2

DEFINITIONS OF WORDS AND TERMS

 Unless otherwise specified, “day” throughout the FAR means “calendar day”. (FAC 90-31)

2.101 Definitions. [FAC 90-31, Case 94-701]

FAR as of FAC 90-25


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FAR as revised

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Day means, unless otherwise specified, a calendar day.

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 To support paperless transactions, the FAR allows the use of electronic signatures. Moreover, the words “in writing” or “written”, as used in the FAR, do not necessarily refer to paper documents — the words apply equally to electronic files transmitted and stored on magnetic or optical media. (§2.101, FAC 90-29, Case 91-104)

2.101 Definitions. [FAC 90-29, Case 91-104]

FAR as of FAC 90-25

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FAR as revised

In writing or written means any worded or numbered expression which can be read, reproduced, and later communicated, and includes electronically transmitted and stored information. [FAC 90-29]

Signature or signed means the discrete, verifiable symbol of an individual which, when affixed to a writing with the knowledge and consent of the individual, indicates a present intention to authenticate the writing. This includes electronic symbols.

PART 3

IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

☞ The Federal Acquisition Streamlining Act repealed the requirement that "every contract or agreement" express the condition that certain officials shall not benefit from the award of that contract or agreement. This condition had been expressed in FAR clause 52.203-1. The clause has been deleted, along with the related statements of policy in FAR 3.102 through 3.102-2. The criminal provisions found at 18 U.S.C. 431 and 432 remain in effect. (§3.102 through 3.102-2 and 52.203-1, FAC 90-30, Case 94-802)

3.102 Reserved ~~Officials not to benefit.~~

3.102-1 ~~General.~~

—41 U.S.C. 22 requires that most Government contracts explicitly state that no member of Congress shall be admitted to any share or part of the contract or any benefit arising from it. If a contract is made between the U.S. Government and any member of or delegate to Congress, or resident commissioner, it may constitute a violation of 18 U.S.C. 431 and 432, resulting in—

- (a) Both the officer or employee of the Government who awarded the contract and the member, delegate, or resident commissioner being subject to criminal penalties;
- (b) The contract being void; and
- (c) The contractor having to return any consideration paid by the Government under the contract.

3.102-2 ~~Contract clause.~~

—The contracting officer shall insert the clause at 52.203-1, Officials Not to Benefit, in solicitations and contracts exceeding the **simplified acquisition threshold**, except those related to agriculture that are exempted by 41 U.S.C. 22.

52.203-1 Reserved. ~~Officials Not to Benefit.~~

—As prescribed in 3.102-2, insert the following clause in solicitations and contracts, except those related to agriculture that are exempted by 41 U.S.C. 22:

OFFICIALS NOT TO BENEFIT (APR 1984)

—No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit arising from it. However, this clause does not apply to this contract to the extent that this contract is made with a corporation for the corporation's general benefit.

✋ When acquiring commercial items, contractors do NOT have to require their employees to individually certify that they are familiar with the Procurement Integrity Act and will report violations of the Act. (§3.104-9 and 52.203-8, FAC 90-30, Case 94-804]

3.104-9 Certification requirements.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) <i>Applicability.</i> Subsection 27(e) of the Act requires certifications, prior to the award of a Federal agency contract or contract modification for property or services in excess of \$100,000 awarded or executed on or after December 1, 1990, by the officer or employee of the contractor responsible for the offer or bid for that particular contract or contract modification for property or services, and by the contracting officer for that procurement.</p> <p>(b) <i>Competing contractor certification.</i></p> <p>(1) Except as provided in 3.104-9(f), contracting officers shall require the competing contractor to—</p> <p>(i) Certify in writing to the contracting officer responsible for the procurement that, to the best of his or her knowledge and belief, such officer or employee of the competing contractor has no information concerning a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act (see 3.104-3) as implemented in the FAR; or</p> <p>(ii) Disclose to such contracting officer any and all such information, and certify in writing to such contracting officer that any and all such information has been disclosed; and</p> <p>(iii) Certify in writing to such contracting officer that, to the best of his or her knowledge and belief, each officer, employee, agent, representative, and consultant of such competing contractor who, on or after December 1, 1990, has participated personally and substantially in the preparation or submission of such bid or offer, or in a modification of a contract, as the case may be, has certified in writing to such competing contractor that he or she—</p> <p>(A) Is familiar with, and will comply with, the requirements of subsection 27(a) of the Act (see 3.104-3) as implemented in the FAR; and</p> <p>(B) Will report immediately to the</p>	<p>(a) <i>Applicability.</i> Subsection 27(e) of the Act requires certifications, prior to the award of a Federal agency contract or contract modification for property or services in excess of \$100,000 awarded or executed on or after December 1, 1990, by the officer or employee of the contractor responsible for the offer or bid for that particular contract or contract modification for property or services, and by the contracting officer for that procurement.</p> <p>(b) <i>Competing contractor certification.</i></p> <p>(1) Except as provided in 3.104-9(f), contracting officers shall require the competing contractor to—</p> <p>(i) Certify in writing to the contracting officer responsible for the procurement that, to the best of his or her knowledge and belief, such officer or employee of the competing contractor has no information concerning a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act (see 3.104-3) as implemented in the FAR; or</p> <p>(ii) Disclose to such contracting officer any and all such information, and certify in writing to such contracting officer that any and all such information has been disclosed; and</p> <p>(iii) Except in the case of a contract for the procurement of commercial items, certify in writing to such contracting officer that, to the best of his or her knowledge and belief, each officer, employee, agent, representative, and consultant of such competing contractor who, on or after December 1, 1990, has participated personally and substantially in the preparation or submission of such bid or offer, or in a modification of a contract, as the case may be, has certified in writing to such competing contractor that he or she—</p> <p>(A) Is familiar with, and will comply with, the requirements of subsection 27(a) of the Act (see 3.104-3) as implemented in</p>


officer or employee of the competing contractor responsible for the offer or bid for any contract or the modification of a contract, as the case may be, any information concerning a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act (see 3.104-3), occurring on or after December 1, 1990, as implemented in the FAR.

the FAR; and

(B) Will report immediately to the officer or employee of the competing contractor responsible for the offer or bid for any contract or the modification of a contract, as the case may be, any information concerning a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act (see 3.104-3), occurring on or after December 1, 1990, as implemented in the FAR.

52.203-8 Requirement for Certificate of Procurement Integrity.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(b) <i>Certifications.</i> As required in paragraph (c) of this provision, the officer or employee responsible for this offer shall execute the following certification:</p> <p style="text-align: center;">CERTIFICATE OF PROCUREMENT INTEGRITY</p> <p style="text-align: center;">* * * * *</p> <p>(2) As required by subsection 27(e)(1)(B) of the Act, I further certify that, to the best of my knowledge and belief, each officer, employee, agent, representative, and consultant of [<i>Name of Offeror</i>] who has participated personally and substantially in the preparation or submission of this offer has certified that he or she is familiar with, and will comply with, the requirements of subsection 27(a) of the Act, as implemented in the FAR, and will report immediately to me any information concerning a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act, as implemented in the FAR, pertaining to this procurement.</p>	<p>(b) <i>Certifications.</i> As required in paragraph (c) of this provision, the officer or employee responsible for this offer shall execute the following certification. The certification in paragraph (b)(2) of this provision is not required for a procurement of commercial items.</p> <p style="text-align: center;">CERTIFICATE OF PROCUREMENT INTEGRITY</p> <p style="text-align: center;">* * * * *</p> <p>(2) As required by subsection 27(e)(1)(B) of the Act, I further certify that, to the best of my knowledge and belief, each officer, employee, agent, representative, and consultant of [<i>Name of Offeror</i>] who has participated personally and substantially in the preparation or submission of this offer has certified that he or she is familiar with, and will comply with, the requirements of subsection 27(a) of the Act, as implemented in the FAR, and will report immediately to me any information concerning a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act, as implemented in the FAR, pertaining to this procurement.</p>

 FAR Subpart 3.9 of the FAR implements the whistleblower protections for contractor employees established by sections 6005 and 6006 of the Federal Acquisition Streamlining Act (FASA). This subpart establishes remedies for contractor employees who are discharged, demoted or otherwise discriminated against as a reprisal for disclosing a substantial violation of law related to a contract to an “authorized official of an agency”. No clause is prescribed or necessary to make these remedies available to contractor employees.

For the purpose of this subpart, an “authorized official of an agency” means any officer or employee responsible for contracting, program management, audit, inspection, investigation, or enforcement of any law or regulation relating to Government procurement or the subject matter of the contract. If you are an authorized official under this subpart:

1. Document (in the form of memoranda for record) and report disclosures by contractor employees of substantial violations of law.
2. Advise such employees of their rights under FAR subpart 3.9.
3. Refer complaints of reprisals to the Inspector General. [FAC 90-30, Case 94-803]

Subpart 3.9—Whistleblower Protections for Contractor Employees [Subpart added by FAC 90-30]

3.900 Scope of subpart.

3.901 Definitions.

3.902 Applicability.

3.903 Policy.

3.904 Procedures for filing complaints.

3.905 Procedures for investigating complaints.

3.906 Remedies.

3.900 Scope of subpart.

This subpart implements 10 U.S.C. 2409 and 41 U.S.C. 251, *et seq.*, as amended by Sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355).

3.901 Definitions.

Authorized official of an agency means an officer or employee responsible for contracting, program management, audit, inspection, investigation, or enforcement of any law or regulation relating to Government procurement or the subject matter of the contract.

Authorized official of the Department of Justice means any person responsible for the investigation, enforcement, or prosecution of any law or regulation.

Inspector General means an Inspector General appointed under the Inspector General Act of 1978, as amended. In the Department of Defense that is the DOD Inspector General. In the case of an executive agency that does not have an Inspector General, the duties shall be performed by an official designated by the head of the executive agency.

3.902 Applicability.

This subpart applies to all Government contracts.

3.903 Policy.

Government contractors shall not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).

3.904 Procedures for filing complaints.

(a) Any employee of a contractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.903 may file a complaint with the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

- (1) The name of the contractor;
- (2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;
- (3) The substantial violation of law giving rise to the disclosure;
- (4) The nature of the disclosure giving rise to the discriminatory act; and
- (5) The specific nature and date of the reprisal.

3.905 Procedures for investigating complaints.

(a) Upon receipt of a complaint, the Inspector General shall conduct an initial inquiry. If the Inspector General determines that the complaint is frivolous or for other reasons does not merit further investigation, the Inspector General shall advise the complainant that no further action on the complaint will be taken.

(b) If the Inspector General determines that the complaint merits further investigation, the Inspector General shall notify the complainant, contractor, and head of the contracting activity. The Inspector General shall conduct an investigation and provide a written report of findings to the head of the agency or designee.

(c) Upon completion of the investigation, the head of the agency or designee shall ensure that the Inspector General provides the report of findings to—

- (1) The complainant and any person acting on the complainant's behalf;
- (2) The contractor alleged to have committed the violation; and
- (3) The head of the contracting activity.

(d) The complainant and contractor shall be afforded the opportunity to submit a written response to the report of findings within 30 days to the head of the agency or designee. Extensions of time to file a written response may be granted by the head of the agency or designee.

(e) At any time, the head of the agency or designee may request additional investigative work be done on the complaint.

3.906 Remedies.

(a) If the head of the agency or designee determines that a contractor has subjected one of its employees to a reprisal for providing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, the head of the agency or designee may take one or more of the following actions:

- (1) Order the contractor to take affirmative action to abate the reprisal.
- (2) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.
- (3) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(b) Whenever a contractor fails to comply with an order, the head of the agency or designee shall request the Department of Justice to file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

(c) Any person adversely affected or aggrieved by an order issued under this section may obtain review of the order's conformance with the law, and this subpart, in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency or designee. Review shall conform to Chapter 7 of Title 5, United States Code.

PART 4

ADMINISTRATIVE MATTERS

✎ The FAR no longer requires contracting officers to make to reproduce paper copies and stamp those copies with the words “DUPLICATE ORIGINAL” — as being the only copies of executed documents that have the same force and effect as signed originals. (§4.101 and 4.201, FAC 90-29, Case 91-104)

4.101 Contracting officer’s signature.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) Only contracting officers shall sign contracts on behalf of the United States. The contracting officer’s name and official title shall be typed, stamped, or printed on the contract. The contracting officer normally signs the contract after it has been signed by the contractor. The contracting officer shall ensure that the signer(s) have authority to bind the contractor (see specific requirements in 4.102 below).</p> <p>(b) Each signed or reproduced copy of the signed contract or modification that is intended to have the same force and effect as the signed original shall be marked “DUPLICATE ORIGINAL.”</p>	<p>Only contracting officers shall sign contracts on behalf of the United States. The contracting officer's name and official title shall be typed, stamped, or printed on the contract. The contracting officer normally signs the contract after it has been signed by the contractor. The contracting officer shall ensure that the signer(s) have authority to bind the contractor (see specific requirements in 4.102 of this subpart).</p>

4.201 Procedures.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>Contracting officers shall distribute copies of contracts or modifications within 10 working days after execution by all parties. As a minimum, the contracting officer shall—</p> <p>(a) Distribute simultaneously one signed copy or reproduction of the signed contract (see 4.101(b)), to the contractor and the paying office;</p> <p>(b) When a contract is assigned to another office for contract administration (see Subpart 42.2), provide to that office—</p> <p>(1) One copy or reproduction of the signed contract and of each modification (stamped “DUPLICATE ORIGINAL,” see 4.101(b)); and</p> <p>(2) A copy of the contract distribution list, showing those offices that should receive copies of modifications, and any changes to the list as they occur;</p>	<p>Contracting officers shall distribute copies of contracts or modifications within 10 working days after execution by all parties. As a minimum, the contracting officer shall—</p> <p>(a) Distribute simultaneously one signed copy or reproduction of the signed contract, to the contractor and the paying office;</p> <p>(b) When a contract is assigned to another office for contract administration (see Subpart 42.2), provide to that office—</p> <p>(1) One copy or reproduction of the signed contract and of each modification; and</p> <p>(2) A copy of the contract distribution list, showing those offices that should receive copies of modifications, and any changes to the list as they occur;</p> <p>(c) Distribute one copy to each accounting and</p>

(c) Distribute one copy to each accounting and finance office (funding office) whose funds are cited in the contract;

(d) When the contract is not assigned for administration but contains a Cost Accounting Standards clause, provide one copy of the contract to the cognizant administrative contracting officer and mark the copy "FOR COST ACCOUNTING STANDARDS ADMINISTRATION ONLY" (see 30.401(b));

finance office (funding office) whose funds are cited in the contract;

(d) When the contract is not assigned for administration but contains a Cost Accounting Standards clause, provide one copy of the contract to the cognizant administrative contracting officer and mark the copy "FOR COST ACCOUNTING STANDARDS ADMINISTRATION ONLY" (see 30.601(b));

👉 There are new FPDS reporting fields for awards to small disadvantaged business, women owned business concerns, number of offers, award of task order contracts, and awards for commercial items. OFPP is revising the form. (FAC 90-31, Case 94-701)

4.601 Record requirements.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>*****</p> <p>(c) In addition to paragraph (b) above with respect to each procurement carried out using procedures other than competitive procedures, agencies shall be able to access from the computer file—</p> <p>(1) The reason under Subpart 6.3 for the use of such procedures; and</p> <p>(2) The identity of the organization or activity which conducted the procurement.</p>	<p>*****</p> <p>(c) In addition to paragraph (b) above with respect to each procurement carried out using procedures other than competitive procedures, agencies shall be able to access from the computer file—</p> <p>(1) The reason under Subpart 6.3 for the use of such procedures; and</p> <p>(2) The identity of the organization or activity which conducted the procurement.</p> <p>(d) In addition to the information described in paragraphs (b) and (c) of this section, for procurements in excess of \$25,000, <u>agencies shall be able to access information on the following from the computer file:</u></p> <p>(1) Awards to small disadvantaged businesses using either set-asides or full and open competition.</p> <p>(2) Awards to business concerns owned and controlled by women.</p> <p>(3) The number of offers received in response to a solicitation.</p> <p>(4) Task or delivery order contracts.</p> <p>(5) Contracts for the acquisition of commercial items.</p>
<p>⊕ This information shall be transmitted to the Federal Procurement Data System in accordance with agency procedures.</p>	<p>(e) This information shall be transmitted to the Federal Procurement Data System in accordance with agency procedures.</p>

✋ The Comptroller General’s right of access to contractor records is established by the clauses at 52.214-26 and 52.215-2 — the clause at 52.215-1 is reserved. (§4.702 and 15.106-1, FAC 90-31, Case 94-740)

4.702 Applicability.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) This subpart applies to records generated under contracts that contain one of the following clauses: (1) Examination of Records by Comptroller General (52.215-1). (2) Audit—Sealed Bidding (52.214-26). (3) Audit—Negotiation (52.215-2). * * * *	(a) This subpart applies to records generated under contracts that contain one of the following clauses: (1) Audit and Records—Sealed Bidding (52.214-26). (2) Audit and Records—Negotiation (52.215-2) * * * *

✋ The FAR redefines the term “records” to include not only books and documents but also “accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.”

✋ Contractors and subcontractors do NOT have to maintain or produce original records for Government audits if they provide photographic or electronic images of the original records AND all of the following are true:

- Electronic records include all significant information from paper originals.
- The imaging process preserves accurate images of the original records, including signatures and other written or graphic images.
- The imaging process is sufficiently reliable and secure to maintain the integrity of the original records.
- An effective indexing system permits timely and convenient access to the imaged records.
- The contractor or subcontractor retains the original records for a minimum of one year after imaging to permit periodic validation of the imaging systems.

(§4.703, 52.214-26, and 52.215-2; FAC 90-31, Case 94-740)

4.703 Policy.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
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(a) Except as stated in 4.703(b), contractors shall make available books, records, documents, and other supporting evidence to satisfy contract negotiation, administration, and audit requirements of the contracting agencies and the Comptroller General for (1) 3 years after final payment or, for certain records, (2) the period specified in 4.705 through 4.705-3, whichever of these periods expires first.

(b) Contractors shall make available the foregoing ~~documents~~ and supporting evidence for a longer period of time than is required in 4.703(a) if—

- (1) A retention period longer than that cited in 4.703(a) is specified in any contract clause; or
- (2) The contractor, for its own purposes, retains the foregoing ~~documents~~ and supporting evidence for a longer period. Under this circumstance, the retention period shall be the period of the contractor's retention or 3 years after final payment, whichever period expires first.

(3) The contractor does not meet the original 90-day due date for submission of final indirect cost rate proposals specified in subparagraph (d)(2) of the clause at 52.216-7, Allowable Cost and Payment, and subparagraph (c)(2) of the clause at 52.216-13, Allowable Cost and Payment—Facilities. Under these circumstances, the retention periods in 4.705 shall be automatically extended one day for each day the proposal is not submitted after the original 90-day due date.

~~(c) Contractors need not retain duplicate copies of records or supporting documents unless they contain significant information not shown on the record copy.~~

~~(d) Contractors may retain records in any medium (paper, electronic, microfilm, etc.) or any combination of media, as long as the requirements of this subpart are satisfied. The process used to create and store records must record and reproduce the original document, including signatures and other written or graphic images, completely, accurately, and clearly. Data transfer, storage, and retrieval procedures shall protect the original data from~~

(a) Except as stated in 4.703(b), contractors shall make available records, **which includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form**, and other supporting evidence to satisfy contract negotiation, administration, and audit requirements of the contracting agencies and the Comptroller General for (1) 3 years after final payment or, for certain records, (2) the period specified in 4.705 through 4.705-3, whichever of these periods expires first.

(b) Contractors shall make available the foregoing **records** and supporting evidence for a longer period of time than is required in 4.703(a) if—

(1) A retention period longer than that cited in 4.703(a) is specified in any contract clause; or

(2) The contractor, for its own purposes, retains the foregoing **records** and supporting evidence for a longer period. Under this circumstance, the retention period shall be the period of the contractor's retention or 3 years after final payment, whichever period expires first.

(3) The contractor does not meet the original 90-day due date for submission of final indirect cost rate proposals specified in subparagraph (d)(2) of the clause at 52.216-7, Allowable Cost and Payment, and subparagraph (c)(2) of the clause at 52.216-13, Allowable Cost and Payment—Facilities. Under these circumstances, the retention periods in 4.705 shall be automatically extended one day for each day the proposal is not submitted after the original 90-day due date.

(c) **Nothing in this section shall be construed to preclude a contractor from duplicating or storing original records in electronic form unless they contain significant information not shown on the record copy. Original records need not be maintained or produced in an audit if the contractor or subcontractor provides photographic or electronic images of the original records and meets the following requirements:**

(1) **The contractor or subcontractor has established procedures to ensure that the**

alteration.

imaging process preserves accurate images of the original records, including signatures and other written or graphic images, and that the imaging process is reliable and secure so as to maintain the integrity of the records.

(2) The contractor or subcontractor maintains an effective indexing system to permit timely and convenient access to the imaged records.

(3) The contractor or subcontractor retains the original records for a minimum of one year after imaging to permit periodic validation of the imaging systems

(e) If the information described in paragraph (a) of this section is maintained on a computer, contractors shall retain the computer data on a reliable medium for the time periods prescribed. Contractors may transfer computer data in machine readable form from one reliable computer medium to another. Contractors' computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original computer data. Contractors shall also retain an audit trail describing the data transfer. For the record retention time periods prescribed, contractors shall not destroy, discard, delete, or write over such computer data. [FAC 90-23]

(d) If the information described in paragraph (a) of this section is maintained on a computer, contractors shall retain the computer data on a reliable medium for the time periods prescribed. Contractors may transfer computer data in machine readable form from one reliable computer medium to another. Contractors' computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original computer data. Contractors shall also retain an audit trail describing the data transfer. For the record retention time periods prescribed, contractors shall not destroy, discard, delete, or write over such computer data. [FAC 90-23]

4.706 [Reserved] ~~Microfilming records.~~

4.706-1 ~~General.~~

~~—(a) Contractors may use microfilm (e.g., film chips, jackets, aperture cards, microprints, roll film, and microfiche) for recordkeeping, subject to the limitations in this subpart.~~

~~—(b) In the process of microfilming documents, the contractor shall also microfilm all relevant notes, worksheets, and other papers necessary for reconstructing or understanding the records.~~

~~—(c) The contractor shall review all microfilm before destroying the hard-copy documents to ensure legibility and reproducibility of the microfilm.~~

~~—(d) Unless earlier retirement of records is permitted by 4.705, or the administrative contracting officer agrees to a lesser retention period when the contractor has established adequate internal controls including continuing surveillance over the microfilm system, the contractor shall not destroy original records that have been microfilmed, until—~~

~~—(1) All claims under the contract are settled;~~

~~—(2) Eighteen months have passed since final payment; or~~

~~—(3) The time original records are required to be kept by other laws or regulations has elapsed.~~

4.706-2 ~~Filing and retrieval.~~

~~—The contractor shall—~~

~~—(a) Maintain an effective indexing system to permit timely and convenient access to the microfilmed records by the Government;~~

- ~~—(b) Provide strict security measures to prevent the loss of microfilm and to safeguard classified information;~~
- ~~—(c) Store microfilm in a fireproof cabinet in an environment ensuring the safety of these records for the specified retention periods; and~~
- ~~—(d) Have adequate viewing equipment and provide printouts the approximate size of the original material.~~

~~4.706-3 Quality control.~~

- ~~—(a) Microfilm, when displayed on a microfilm reader (viewer) or reproduced on paper, must exhibit a high degree of legibility and readability.~~
- ~~—(b) The quality of the contractor's record microfilming process is subject to periodic review by the administrative contracting officer.~~

PART 5

PUBLICIZING CONTRACT ACTIONS

☞ When small businesses request copies of electronically disseminated solicitations, you may e-mail the copies to the firm's electronic address. (§5.102, FAC 90-29, 91-104)

5.102 Availability of solicitations.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) The contracting officer shall— * * * * *	(a) The contracting officer shall— * * * * *
(4) In addition to the methods of disseminating proposed contract information in 5.101(a) and (b), provide, upon request to small business concerns, as required by 15 U.S.C. 637(b)—	(4) In addition to the methods of disseminating proposed contract information in 5.101(a) and (b), provide, upon request to small business concerns, as required by 15 U.S.C. 637(b)—
(i) A copy of the solicitation and specifications; * * * * *	(i) A copy of the solicitation and specifications. In the case of solicitations disseminated by electronic data interchange, solicitations may be furnished directly to the electronic address of the small business concern. * * * * *

☞ There is an exception to synopsisizing requirements when the contract action is for the services of an expert to support the Federal Government in any current or anticipated litigation or dispute. (§5.202 and §5.301, FAC 90-31, Case 94-701).

☞ No synopsis will be required for actions up to \$250,000 made through a certified FACNET after Governmentwide FACNET has been certified. Until then, no synopsis is required for any action over \$25,000 through the Simplified Acquisition Threshold (\$100,000) which is made through a certified FACNET. (§5.202, FAC 90-29, Case 94-770)

5.202 Exceptions.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
The contracting officer need not submit the notice required by 5.201 when—	The contracting officer need not submit the notice required by 5.201 when—

(a) The contracting officer determines that—
* * * *

- (11) * * * *; ~~or~~
(12) * * * *.

(a) The contracting officer determines that—
* * * *

- (11) * * * *; ~~or~~
(12) * * * *.

(13) The contract action is for an amount expected to exceed \$25,000 but not expected to exceed the simplified acquisition threshold and is made by a contracting activity that has been certified as having implemented a system with interim (until December 31, 1999) or full (after December 31, 1999) FACNET and the contract action will be made through FACNET; [FAC 90-29]

(14) The contract action is for an amount at or below \$250,000 and is made through certified FACNET after Governmentwide FACNET has been certified. This exception does not apply when the contract action is not made through certified FACNET (see Subpart 4.5) ; or [FAC 90-29]

(15) The contract action is made under conditions described in 6.302-3 with respect to the services of an expert to support the Federal Government in any current or anticipated litigation or dispute. [FAC 90-31]

5.301 General.

FAR as of FAC 90-25

(a) Except for contract actions described in paragraph (b) of this section, contracting officers shall synopsise in the Commerce Business Daily (CBD) awards exceeding \$25,000 that (1) are subject to the Trade Agreements Act (see 25.402 and 25.403), or (2) are likely to result in the award of any subcontracts. However, the dollar threshold is not a prohibition against publicizing an award of a smaller amount when publicizing would be advantageous to industry or to the Government.

(b) A notice is not required under paragraph (a) of this section if—

* * * *

- (5) * * * *; ~~or~~

(6) The award is for utility services, other than telecommunications services, and only one source is available.

FAR as revised

(a) Except for contract actions described in paragraph (b) of this section, contracting officers shall synopsise in the Commerce Business Daily (CBD) awards exceeding \$25,000 that (1) are subject to the Trade Agreements Act (see 25.402 and 25.403), or (2) are likely to result in the award of any subcontracts. However, the dollar threshold is not a prohibition against publicizing an award of a smaller amount when publicizing would be advantageous to industry or to the Government.

(b) A notice is not required under paragraph (a) of this section if—

* * * *

(6) The award is for utility services, other than telecommunications services, and only one source is available;

(7) **The contract action is for an amount greater than \$25,000 but not**

greater than the simplified acquisition threshold, the contract action is made by a contracting office that has been certified as having implemented a system with interim (until December 31, 1999) or full (after December 31, 1999) FACNET, and the contract action has been made through FACNET; or [FAC 90-30]

(8) The award is for the services of an expert to support the Federal Government in any current or anticipated litigation or dispute pursuant to the exception to full and open competition authorized at 6.302-3. [FAC 90-31]

☞ When solicitations are made available through electronic data interchange, the CBD synopsis must provide the information necessary to obtain the solicitation (e.g., electronic address and downloading instructions) and respond to it. (§5.207, FAC 90-29, Case 91-104).

5.207 Preparation and transmittal of synopses.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>*****</p> <p>(c) <i>General format for Item 17, "Description."</i></p> <p>(1) Prepare a clear and concise description of the supplies or services that is not unnecessarily restrictive of competition and will allow a prospective offeror to make an informed business judgment as to whether a copy of the solicitation should be requested.</p> <p>(2) Do not include In Item 17 the CBD supply or service classification code from Item 6.</p> <p>*****</p>	<p>*****</p> <p>(c) <i>General format for Item 17, "Description."</i></p> <p>(1) Prepare a clear and concise description of the supplies or services that is not unnecessarily restrictive of competition and will allow a prospective offeror to make an informed business judgment as to whether a copy of the solicitation should be requested.</p> <p>(2) Do not include In Item 17 the CBD supply or service classification code from Item 6.</p> <p>*****</p> <p>xvii. If the solicitation will be made available to interested parties through electronic data interchange, provide any information necessary to obtain and respond to the solicitation electronically.</p>

PART 6

COMPETITION REQUIREMENTS

☞ The following are additional reasons (over and above those previously in the FAR) for excluding a particular source to establish or maintain an alternative source or sources.

- Ensure the continuous availability of a reliable source of supplies or services.
- Satisfy projected needs based on a history of high demand.
- Satisfy a critical need for medical, safety, or emergency supplies.

6.202 Establishing or maintaining alternative sources. (FAC 90-31, 94-701)

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) Agencies may exclude a particular source from a contract action in order to establish or maintain an alternative source or sources for the supplies or services being acquired if the agency head determines that to do so would—</p> <p>(1) Increase or maintain competition and likely result in reduced overall costs for the acquisition, or for any anticipated acquisition, of such supplies or services;</p> <p>(2) Be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the supplies or services in case of a national emergency or industrial mobilization; or</p> <p>(3) Be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.</p>	<p>(a) Agencies may exclude a particular source from a contract action in order to establish or maintain an alternative source or sources for the supplies or services being acquired if the agency head determines that to do so would—</p> <p>(1) Increase or maintain competition and likely result in reduced overall costs for the acquisition, or for any anticipated acquisition;</p> <p>(2) Be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the supplies or services in case of a national emergency or industrial mobilization;</p> <p>(3) Be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;</p> <p>(4) Ensure the continuous availability of a reliable source of supplies or services;</p> <p>(5) Satisfy projected needs based on a history of high demand; or</p> <p>(6) Satisfy a critical need for medical, safety, or emergency supplies.</p>

☞ There is a new exception for acquiring the services of an expert for a current or “reasonably foreseeable” litigation or dispute. However, this exception does not authorize contracting officers to disregard other policies and procedures applicable to contracting for

such services, such as policies governing conflict of interest or restrictions on contracting for inherently governmental functions.

6.302-3 Industrial mobilization; engineering, developmental, or research capability; or expert services. (FAC 90-31, 94-701)

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) (2) Full and open competition need not be provided for when it is necessary to award the contract to a particular source or sources in order (i) to maintain a facility, producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency or to achieve industrial mobilization, or (ii) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.</p>	<p>(a) (2) Full and open competition need not be provided for when it is necessary to award the contract to a particular source or sources in order (i) to maintain a facility, producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency or to achieve industrial mobilization, (ii) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center, or (iii) to acquire the services of an expert for any current or anticipated litigation or dispute.</p> <p>(b) * * * * * (3) Use of the authority in paragraph (a)(2)(iii) of this subsection may be appropriate when it is necessary to <u>acquire the services of either—</u></p> <p><u>(i) An expert to use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Government in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, whether or not the expert is expected to testify. Examples of such services include, but are not limited to:</u></p> <p><u>(A) Assisting the Government in the analysis, presentation, or defense of any claim or request for adjustment to contract terms and conditions, whether asserted by a contractor or the Government, which is in litigation or dispute, or is anticipated to result in dispute or litigation before any court, administrative tribunal, or agency, or</u></p> <p><u>(B) Participating in any part of an alternative dispute resolution process, including but not limited to evaluators, fact finders, or witnesses, regardless of whether the expert is expected to testify; or</u></p> <p><u>(ii) A neutral person, e.g., mediators or arbitrators, to facilitate the resolution</u></p>

of issues in an alternative dispute resolution process.

☛ If a law enacted after the Streamlining Act directs awards to a contractor (or any other non-Federal entity), **IGNORE** that direction **UNLESS** the law **specifically**:

- Identifies the contractor (or other entity) **AND**
- References 10 U.S.C. 2304(j) for armed services acquisitions or section 303(h) of the Federal Property and Administrative Services Act of 1949 for civilian agency acquisitions **AND**
- States that award to that contractor shall be made “in contravention of the merit-based selection procedures” in 10 U.S.C. 2304(j) or section 303(h) of the Federal Property and Administrative Services Act of 1949.

Exceptions:

- Comply with statutory direction to continue work being performed by the specified contractor under a contract awarded prior to the Act.
- Comply with statutory requirements to contract with the National Academy of Sciences to “investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on those matters to the Congress or any agency of the Federal Government.”

6.302-5 Authorized or required by statute. (FAC 90-31, 94-701)

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>a) <i>Authority.</i></p> <p>(1) Citations: 10 U.S.C. 2304(c)(5) or 41 U.S.C. 253(c)(5).</p> <p>(2) Full and open competition need not be provided for when (i) a statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source, or (ii) the agency’s need is for a brand name commercial item for authorized resale.</p> <p>(b) <i>Application.</i> This authority may be used when statutes, such as the following, expressly authorize or require that acquisition be made from a specified source or through another agency:</p> <p>(1) Federal Prison Industries (UNICOR)—18 U.S.C. 4124 (see Subpart 8.6);</p> <p>(2) Qualified Nonprofit Agencies for the Blind or other Severely Handicapped—41 U.S.C. 46-48c (see Subpart 8.7);</p> <p>(3) Government Printing and Binding—44 U.S.C. 501-504, 1121 (see Subpart 8.8); or</p> <p>(4) Sole source awards under the 8(a) Program—15 U.S.C. 637 (see Subpart 19.8).</p>	<p>a) <i>Authority.</i></p> <p>(1) Citations: 10 U.S.C. 2304(c)(5) or 41 U.S.C. 253(c)(5).</p> <p>(2) Full and open competition need not be provided for when (i) a statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source, or (ii) the agency’s need is for a brand name commercial item for authorized resale.</p> <p>(b) <i>Application.</i> This authority may be used when statutes, such as the following, expressly authorize or require that acquisition be made from a specified source or through another agency:</p> <p>(1) Federal Prison Industries (UNICOR)—18 U.S.C. 4124 (see Subpart 8.6);</p> <p>(2) Qualified Nonprofit Agencies for the Blind or other Severely Handicapped—41 U.S.C. 46-48c (see Subpart 8.7);</p> <p>(3) Government Printing and Binding—44 U.S.C. 501-504, 1121 (see Subpart 8.8); or</p> <p>(4) Sole source awards under the 8(a) Program—15 U.S.C. 637 (see Subpart 19.8).</p> <p>(c) <i>Limitations.</i> (1) This authority shall not be used when a provision of law</p>

requires an agency to award a new contract to a specified non-Federal Government entity unless the provision of law specifically—

(i) Identifies the entity involved;
(ii) Refers to 10 U.S.C. 2304(j) for armed services acquisitions or section 303(h) of the Federal Property and Administrative Services Act of 1949 for civilian agency acquisitions; and

(iii) States that award to that entity shall be made in contravention of the merit-based selection procedures in 10 U.S.C. 2304(j) or section 303(h) of the Federal Property and Administrative Services Act, as appropriate. However, this limitation does not apply—

(A) When the work provided for in the contract is a continuation of the work performed by the specified entity under a preceding contract; or

(B) To any contract requiring the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on those matters to the Congress or any agency of the Federal Government.

(c) *Limitations.* ... (2) Contracts awarded using this authority shall be supported by the written justifications and approvals described in 6.303 and 6.304, except for—

(i) Contracts awarded under (a)(2)(ii), (b)(2), or (b)(4) of this subsection; or

(ii) Contracts awarded under (a)(2)(i) of this subsection when the statute expressly requires that the procurement be made from a specified source. (Justification and approval requirements apply when the statute authorizes, but does not require, that the procurement be made from a specified source.)

(c) *Limitations.* (1) The authority in ~~paragraph~~ (a)(2)(ii) above may be used only for purchases of brand-name commercial items for resale through commissaries or other similar facilities. Ordinarily, these purchases will involve articles desired or preferred by customers of the selling activities (but see 6.301(d)).

(2) Contracts awarded using this authority shall be supported by the written justifications and approvals described in 6.303 and 6.304, except for—

(i) Contracts awarded under (a)(2)(ii), (b)(2), or (b)(4) of this subsection; or

(ii) Contracts awarded under (a)(2)(i) of this subsection when the statute expressly requires that the procurement be made from a specified source. (Justification and approval requirements apply when the statute authorizes, but does not require, that the procurement be made from a specified source.)

(3) The authority in (a)(2)(ii) **of this subsection** may be used only for purchases of brand-name commercial items for resale through commissaries or other similar facilities. Ordinarily, these purchases will involve articles desired or preferred by customers of the selling activities (but see 6.301(d)).



✎ When preparing justifications, the authors must demonstrate that they have conducted market research — not a market survey.

6.303 Justifications. ... 6.303-2 Content. (94-790)

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) Each justification shall contain sufficient facts and rationale to justify the use of the specific authority cited. As a minimum, each justification shall include the following information: ... (8) A description of the market survey conducted (see 7.101) and the results or a statement of the reasons a market survey was not conducted.	(a) Each justification shall contain sufficient facts and rationale to justify the use of the specific authority cited. As a minimum, each justification shall include the following information: ... (8) A description of the market research conducted (see Part 10) and the results or a statement of the reason market research was not conducted.

✎ Those who can approve a justification over for a proposed contract over \$1,000,000 can also approve a justification for a proposed contract under that dollar amount.

6.304 Approval of the justification. (FAC 90-31, Case 94-701)

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) Except for paragraph (b) of this section, the justification for other than full and open competition shall be approved in writing— (1) For a proposed contract not exceeding \$100,000, the contracting officer's certification required by 6.303-2(a)(12) will serve as approval unless a higher approving level is established in agency procedures. (2) For a proposed contract over \$100,000 but not exceeding \$1,000,000, by the competition advocate for the procuring activity designated pursuant to 6.501. This authority is not delegable. (3) For a proposed contract over \$1,000,000 but not exceeding \$10,000,000, by the head of the procuring activity, or a designee who— (i) If a member of the armed forces, is a general or flag officer; or (ii) If a civilian, is serving in a position in grade GS 16 or above under the General Schedule (or in a comparable or higher position under another schedule). (4) Except for DOD, NASA, and the Coast Guard, for a proposed contract over \$10,000,000, by the senior procurement executive of the agency designated pursuant to the OFPP Act (41 U.S.C. 414(3)) in accordance with agency	(a) Except for paragraph (b) of this section, the justification for other than full and open competition shall be approved in writing— (1) For a proposed contract not exceeding \$100,000, the contracting officer's certification required by 6.303-2(a)(12) will serve as approval unless a higher approving level is established in agency procedures. (2) For a proposed contract over \$100,000 but not exceeding \$1,000,000, by the competition advocate for the procuring activity designated pursuant to 6.501 or an official described in paragraph (a)(3) or (a)(4) of this section. This authority is not delegable. (3) For a proposed contract over \$1,000,000 but not exceeding \$10,000,000, by the head of the procuring activity, or a designee who— (i) If a member of the armed forces, is a general or flag officer; or (ii) If a civilian, is serving in a position in grade GS 16 or above under the General Schedule (or in a comparable or higher position under another schedule). (4) Except for DOD, NASA, and the Coast Guard, for a proposed contract over \$10,000,000, by the senior procurement executive of the

procedures. This authority is not delegable.
...

agency designated pursuant to the OFPP Act (41
U.S.C. 414(3)) in accordance with agency
procedures. This authority is not delegable.

PART 7

ACQUISITION PLANNING

☞ When conducting a cost comparison, the cost estimate for Government performance can be provided either in a sealed dated envelope or an electronic equivalent. (§7.304, FAC 90-29, 91-104)

7.304 Procedures.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(b) <i>Cost estimate</i></p> <p>* * * * *</p> <p>(3) Submit to the contracting officer the completed form and all necessary detailed supporting data in a sealed, dated envelope not later than the time established for receipt of initial proposals or bid opening. If more time is needed to develop the Government's cost estimate, the contracting officer shall amend the opening date of the solicitation.</p>	<p>(b) <i>Cost estimate</i></p> <p>* * * * *</p> <p>(3) Submit to the contracting officer the completed form and all necessary detailed supporting data in a sealed, dated envelope, or electronic equivalent, not later than the time established for receipt of initial proposals or bid opening. If more time is needed to develop the Government's cost estimate, the contracting officer shall amend the opening date of the solicitation.</p>

7.306 Evaluation.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) <i>Sealed bidding.</i> (1) At the public bid opening, after recording of bids, the contracting officer shall—</p> <p>(i) Open the sealed envelope containing the cost comparison form on which the cost estimate for Government performance has been entered;</p>	<p>(a) <i>Sealed bidding.</i> (1) At the public bid opening, after recording of bids, the contracting officer shall—</p> <p>(i) Open the sealed cost comparison on which the cost estimate for Government performance has been entered;</p>

7.307 Appeals.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>* * * * *</p> <p>(b) The Circular provides that the appeals procedure shall be used only to resolve questions concerning the calculation of the cost comparison and shall not apply to questions concerning selection of one contractor in preference to another, which shall be treated as prescribed in 14.407-8, Protests against award. * * * * *</p>	<p>* * * * *</p> <p>(b) The Circular provides that the appeals procedure shall be used only to resolve questions concerning the calculation of the cost comparison and shall not apply to questions concerning selection of one contractor in preference to another, which shall be treated as prescribed in 14.408-8, Protests against award. * * * * *</p>

PART 8

REQUIRED SOURCES OF SUPPLIES AND SERVICES

☞ Contracting officers may use an “established electronic communications format” to place orders against Federal Supply Schedules. (§8.405-2, FAC 90-29, 91-104)

8.405-2 Order placement.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
Ordering offices may use Optional Form 347, or an agency-prescribed form, to order items from schedules and shall place orders directly with the contractor within the limitations specified in each schedule. Orders shall include, at a minimum, the following information in addition to any information required by the schedule: * * * * *	Ordering offices may use Optional Form 347, an agency-prescribed form, or an established electronic communications format to order items from schedules and shall place orders directly with the contractor within the limitations specified in each schedule. Orders shall include, at a minimum, the following information in addition to any information required by the schedule: * * * * *

☞ Contracting officers may request supplies or services from a “JWOD participating nonprofit agency” in “writing” rather than by a “letter” request. That is, the request can be transmitted by electronic means rather than through the mails. (§8.705-3, FAC 90-29, 91-104)

8.705-3 Allocation process.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) When the direct order process has not been authorized, the ordering office shall submit a letter request for allocation (requesting the designation of the “JWOD participating nonprofit agency” to produce the supplies or perform the service) to the central nonprofit agency designated in the Procurement List. Ordering offices shall request allocations in sufficient time for a reply, for orders to be placed, and for the “JWOD participating nonprofit agency” to produce the supplies or provide the service within the required delivery or performance schedule.	(a) When the direct order process has not been authorized, the ordering office shall submit a written request for allocation (requesting the designation of the “JWOD participating nonprofit agency” to produce the supplies or perform the service) to the central nonprofit agency designated in the Procurement List. Ordering offices shall request allocations in sufficient time for a reply, for orders to be placed, and for the “JWOD participating nonprofit agency” to produce the supplies or provide the service within the required delivery or performance schedule.

PART 9

CONTRACTOR QUALIFICATIONS

☞ Contracting officers must consider “relevant past performance information” collected pursuant to subpart 42.15. However, contracting officers may not call a vendor “nonresponsible” solely on the basis of a lack of relevant performance history “except as provided in 9.104-2”. (§9.104-2, FAC 90-26)

9.104-1 General standards.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
To be determined responsible, a prospective contractor must— * * * * *	To be determined responsible, a prospective contractor must— * * * * *
(c) Have a satisfactory performance record (see 9.104-3(c)); * * * * *	(c) Have a satisfactory performance record (see 9.104-3(c) and Subpart 42.15). A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2; [FAC 90-26] * * * * *

9.105-1 Obtaining information.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
* * * * *	* * * * *
(c) The contracting officer should use the following sources of information to support determinations of responsibility or nonresponsibility: (1) The list—entitled Parties Excluded from Procurement Programs (list of contractors debarred, suspended, proposed for debarment, and declared ineligible) maintained in accordance with Subpart 9.4. * * * * *	(c) In making the determination of responsibility (see 9.104-1(c)), the contracting officer shall consider relevant past performance information (see Subpart 42.15). In addition, the contracting officer should use the following sources of information to support such determinations: [FAC 90-26] (1) The List of Parties Excluded from Federal Procurement and Nonprocurement Programs maintained in accordance with Subpart 9.4. [FAC 90-28] * * * * *

✎ When a business concern not on the applicable QBL, QML, or QPL expresses interest in the acquisition, the contracting officer must forward the concern's name and address to the agency activity which established the qualification requirement — whether or not the concern requested an actual copy of the solicitation. (§9.206-3, FAC 90-28)

9.206-3 Competition.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>*****</p> <p>(b) <i>Postsolicitation.</i> The contracting officer shall submit to the agency activity which established the qualification requirement the names and addresses of concerns which requested copies of the solicitation but are not included on the applicable QPL, QML, or QBL or identified as meeting the qualification requirement. The activity will then assist interested concerns in meeting the standards specified for qualification (see 9.202(a)(2) and (4)).</p>	<p>*****</p> <p>(b) <i>Postsolicitation.</i> The contracting officer shall submit to the agency activity which established the qualification requirement the names and addresses of concerns which expressed interest in the acquisition but are not included on the applicable QPL, QML, or QBL or identified as meeting the qualification requirement. The activity will then assist interested concerns in meeting the standards specified for qualification (see 9.202(a)(2) and (4)).</p>

✎ Before awarding a contract, contracting officers must check the “List of List of Parties Excluded from Federal Procurement **and Nonprocurement Programs.**” Organizations suspended, debarred, or otherwise excluded from “nonprocurement transactions” are now also ineligible for Federal contracts and vice versa. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. (§9.4, FAC 90-28)

9.401 Applicability.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>This subpart does not apply to the exclusion of participants or principals from Federal financial or nonfinancial assistance programs and benefits pursuant to Executive Order 12549. Such exclusions are contained within the list entitled Parties Excluded from Nonprocurement Programs of the lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.</p>	<p>In accordance with Public Law 103-355, Section 2455 (31 U.S.C. 6101, note), and Executive Order 12689, any debarment, suspension or other Government-wide exclusion initiated under the Nonprocurement Common Rule implementing Executive Order 12549 on or after August 25, 1995, shall be recognized by and effective for Executive Branch agencies as a debarment or suspension under this subpart. Similarly, any debarment, suspension, proposed debarment or other Government-wide exclusion initiated on or after August 25,</p>

1995, under this subpart shall also be recognized by and effective for those agencies and participants as an exclusion under the Nonprocurement Common Rule. [FAC 90-28]

9.403 Definitions.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>*****</p> <p>“Parties Excluded from Procurement Programs,” formerly referred to as the Consolidated List of Debarred, Suspended, and Ineligible Contractors, means a list compiled, maintained, and distributed by the General Services Administration, in accordance with 9.404, containing the names of contractors debarred, suspended, or proposed for debarment by agencies under the procedures of this subpart, as well as contractors declared ineligible under other statutory or regulatory authority other than Executive Order 12549. The list of Parties Excluded from Procurement Programs is contained within the lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.</p>	<p>*****</p> <p><i>List of Parties Excluded from Federal Procurement and Nonprocurement Programs</i> means a list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about parties debarred, suspended, or voluntarily excluded under the Nonprocurement Common Rule or the Federal Acquisition Regulation, parties who have been proposed for debarment under the Federal Acquisition Regulation, and parties determined to be ineligible. [FAC 90-28]</p> <p><i>Nonprocurement Common Rule</i> means the procedures used by Federal Executive Agencies to suspend, debar, or exclude individuals or entities from participation in nonprocurement transactions under Executive Order 12549. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. [FAC 90-28]</p> <p>*****</p>

9.404 List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) The General Services Administration (GSA) shall—</p> <p>(1) Compile and maintain a current, consolidated list of all contractors debarred, suspended, proposed for debarment, or declared ineligible by agencies or by the General Accounting Office;</p>	<p>(a) The General Services Administration (GSA) shall—</p> <p>(1) Compile and maintain a current list of all parties debarred, suspended, proposed for debarment, or declared ineligible by agencies or by the General Accounting Office; [FAC 90-28]</p> <p>*****</p>

* * * * *

(b) The list ~~entitled~~ Parties Excluded from
Procurement Programs shall indicate—

* * * * *

(b) The List of Parties Excluded from Federal
Procurement **and Nonprocurement** Programs
shall indicate— [FAC 90-28]

Other sections where the name of the list was changed:

9.207(a)(9)

9.404

9.405

9.405-2

22.1025

28.203-7

44.202-2

44.303

52.209-6

PART 12

CONTRACT DELIVERY OR PERFORMANCE

☞ To be responsive, bids must offer a delivery date no later than that required by the IFB. If the contractor offers a delivery date that is “X days following my receipt of the contract or notice of award”, contracting officers compare that offered date to the required date. For this purpose, the FAR has long instructed contracting officers to add 5 days to the date of contract award to account for time required by the Post Office to deliver notice of award through the ordinary mail. Now, the FAR instructs contracting officers to add only one day if notice of award is transmitted electronically. (§12.103, §52.212-1, §52.212-2, FAC 90-29, 91-104)

12.103 Supplies or services.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>*****</p> <p>(e) In invitations for bids, if the delivery schedule is based on the date of the contract, and a bid offers delivery based on the date the contractor receives the contract or notice of award, the contracting officer shall evaluate the bid by adding 5 days (as representing the normal time for arrival through ordinary mail). If the offered delivery date computed with mailing time is later than the delivery date required by the invitation for bids, the bid shall be considered nonresponsive and rejected. If award is made, the delivery date will be the number of days offered in the bid after the contractor actually receives the notice of award.</p>	<p>*****</p> <p>In invitations for bids, if the delivery schedule is based on the date of the contract, and a bid offers delivery based on the date the contractor receives the contract or notice of award, the contracting officer shall evaluate the bid by adding 5 calendar days (as representing the normal time for arrival through ordinary mail). If the contract or notice of award will be transmitted electronically, (1) the solicitation shall so state; and (2) the contracting officer shall evaluate delivery schedule based on the date of contract receipt or notice of award, by adding one working day. (The term "working day" excludes weekends and U.S. Federal holidays.) If the offered delivery date computed with mailing or transmittal time is later than the delivery date required by the invitation for bids, the bid shall be considered nonresponsive and rejected. If award is made, the delivery date will be the number of days offered in the bid after the contractor actually receives the notice of award.</p>

52.212-1 Time of Delivery.

<p>*****</p> <p>(b) Attention is directed to the Contract Award provision of the solicitation that provides that a written award or acceptance of offer mailed, or otherwise furnished to the successful offeror, results</p>	<p>*****</p> <p>(b) Attention is directed to the Contract Award provision of the solicitation that provides that a written award or acceptance of offer mailed, or otherwise furnished to the successful offeror, results</p>
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in a binding contract. The Government will mail or otherwise furnish to the offeror an award or notice of award not later than the day award is dated. Therefore, the offeror should compute the time available for performance beginning with the actual date of award, rather than the date the written notice of award is received from the Contracting Officer through the ordinary mails. However, the Government will evaluate an offer that proposes delivery based on the Contractor's date of receipt of the contract or notice of award by adding five days for delivery of the award through the ordinary mails. If, as so computed, the offered delivery date is later than the required delivery date, the offer will be considered nonresponsive and rejected.

in a binding contract. The Government will mail or otherwise furnish to the offeror an award or notice of award not later than the day award is dated. Therefore, the offeror should compute the time available for performance beginning with the actual date of award, rather than the date the written notice of award is received from the Contracting Officer through the ordinary mails. However, the Government will evaluate an offer that proposes delivery based on the Contractor's date of receipt of the contract or notice of award by adding (i) five calendar days for delivery of the award through the ordinary mails, **or (ii) one working day if the solicitation states that the contract or notice of award will be transmitted electronically. (The term "working day" excludes weekends and U.S. Federal holidays.)** If, as so computed, the offered delivery date is later than the required delivery date, the offer will be considered nonresponsive and rejected. [FAC 90-29]

52.212-2 Time of Delivery.

* * * * *

(b) Attention is directed to the Contract Award provision of the solicitation that provides that a written award or acceptance of offer mailed or otherwise furnished to the successful offeror results in a binding contract. The Government will mail or otherwise furnish to the offeror an award or notice of award not later than the day the award is dated. Therefore, the offeror shall compute the time available for performance beginning with the actual date of award, rather than the date the written notice of award is received from the Contracting Officer through the ordinary mails. However, the Government will evaluate an offer that proposes delivery based on the Contractor's date of receipt of the contract or notice of award by adding five days for delivery of the award through the ordinary mails. If, as so computed, the offered delivery date is later than the required delivery date, the offer will be considered nonresponsive and rejected.

* * * * *

(b) Attention is directed to the Contract Award provision of the solicitation that provides that a written award or acceptance of offer mailed or otherwise furnished to the successful offeror results in a binding contract. The Government will mail or otherwise furnish to the offeror an award or notice of award not later than the day the award is dated. Therefore, the offeror shall compute the time available for performance beginning with the actual date of award, rather than the date the written notice of award is received from the Contracting Officer through the ordinary mails. (b) * * * However, the Government will evaluate an offer that proposes delivery based on the Contractor's date of receipt of the contract or notice of award by adding (i) five calendar days for delivery of the award through the ordinary mails, **or (ii) one working day if the solicitation states that the contract or notice of award will be transmitted electronically. (The term "working day" excludes weekends and U.S. Federal holidays.)** If, as so computed, the offered delivery date is later than the required delivery date, the offer will be considered nonresponsive and rejected. [FAC 90-29]

PART 14

SEALED BIDDING

☞ Whenever firms on a mailing list fail to submit an offer in response to a solicitation, the clauses at 52.214-9 and 52.215-15 require them to notify the contracting officer of their desire to continue receiving solicitations for such requirements. Absent such notice, the FAR allows contracting officers to strike their names from the mailing list. The FAR will now permit offerors to deliver the notice electronically rather than on paper. Moreover, contracting officers will not incorporate the clauses at 52.214-9 or 52.215-15 if they solicit offers through electronic data interchange methods that do not require the keeping of solicitation mailing lists. (§14.201-6, 15.407, 52.214-9 and 52.215-15; FAC 90-29, 91-104)

14.201-6 Solicitation provisions.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
* * * *	* * * *
(e) The contracting officer shall insert in invitations for bids, except those for construction, the provisions at— (1) 52.214-9, Failure to Submit Bid; and * * * *	(e) The contracting officer shall insert in invitations for bids, except those for construction, the provisions at— (1) 52.214-9, Failure to Submit Bid, except when using electronic data interchange methods not requiring solicitation mailing lists ; and [FAC 90-29] * * * *

52.214-9 Failure to Submit Bid.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
Recipients of this solicitation not responding with a bid should not return this solicitation, unless it specifies otherwise. Instead, they should advise the issuing office by letter or postcard whether they want to receive future solicitations for similar requirements. If a recipient does not submit a bid and does not notify the issuing office that future solicitations are desired, the recipient's name may be removed from the applicable mailing list.	Recipients of this solicitation not responding with a bid should not return this solicitation, unless it specifies otherwise. Instead, they should advise the issuing office by letter, postcard, or established electronic commerce methods , whether they want to receive future solicitations for similar requirements. If a recipient does not submit a bid and does not notify the issuing office that future solicitations are desired, the recipient's name may be removed from the applicable mailing list. [FAC 90-29]

✎ The FAR redefines the term “records” to include not only books and documents but also “accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.” (§4.703, 52.214-26, and 52.215-2; FAC 90-31, Case 94-740)

✎ Prime contractors are required to incorporate the audit and records clause at FAR 52.214-26 only in those subcontracts expected to exceed the threshold at 15.804-2(a)(1) for submission of cost or pricing data. Previously, prime contracts had to incorporate such clauses in any subcontract over \$10,000. (§52.214-26, FAC 90-31, Case 94-740)

14.201-7 Contract clauses.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-26, Audit—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed the threshold for submission of cost or pricing data at 15.804-2(a)(1). [FAC 90-22] * * * *	(a) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-26, Audit and Records —Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed the threshold at 15.804-2(a)(1) for submission of cost or pricing data. [FAC 90-31] * * * *

52.214-26 Audit and Records—Sealed Bidding.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) <i>Cost or pricing data.</i> If the Contractor has submitted cost or pricing data in connection with the pricing of any modification to this contract, unless the pricing was based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation, the Contracting Officer or a representative who is an employee of the Government shall have the right to examine and audit all books, records, documents, and other data of the Contractor (including computations and projections) related to negotiating, pricing or	(a) As used in this clause, records includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form. (b) <i>Cost or pricing data.</i> If the Contractor has been required to submit cost or pricing data in connection with the pricing of any modification to this contract, the Contracting Officer, or an authorized representative of the Contracting Officer, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data, shall have the right to examine and audit all of the Contractor's records , including computations and projections, related to— (1) The proposal for the modification; (2) The discussions conducted on the

performing the modification, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data.

In the case of pricing any modification, the Comptroller General of the United States or a representative ~~who is an employee of the Government~~ shall have the same rights.

(b) *Availability.* The Contractor shall make available at its office at all reasonable times the materials described in paragraph (a) above, for examination, audit, or reproduction, until 3 years after final payment under this contract, or for any other period specified in Subpart 4.7 of the Federal Acquisition Regulation (FAR). FAR Subpart 4.7, Contractor Records Retention, in effect on the date of this contract, is incorporated by reference in its entirety and made a part of this contract.

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement.

(2) Records pertaining to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to the performance of this contract shall be made available until disposition of such appeals, litigation, or claims.

(c) The Contractor shall insert a clause containing all the provisions of this clause, including this paragraph (c), in all subcontracts ~~over \$10,000 under this contract, altering the clause only as necessary to identify properly the contracting parties and the contracting office under the Government prime contract.~~

proposal(s), including those related to negotiating;

(3) **Pricing of the modification;** or

(4) **Performance of the modification.**


(c) *Comptroller General.* In the case of pricing any modification, the Comptroller General of the United States, or an authorized representative, shall have the same rights **as specified in paragraph (b) of this clause.**

(d) *Availability.* The Contractor shall make available at its office at all reasonable times the materials described in paragraph (b) of this clause, for examination, audit, or reproduction, until 3 years after final payment under this contract, or for any other period specified in Subpart 4.7 of the Federal Acquisition Regulation (FAR). FAR Subpart 4.7, Contractor Records Retention, in effect on the date of this contract, is incorporated by reference in its entirety and made a part of this contract.

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement.

(2) Records pertaining to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to the performance of this contract shall be made available until disposition of such appeals, litigation, or claims.

(e) The Contractor shall insert a clause containing all the provisions of this clause, including this paragraph (e), in all subcontracts **expected to exceed the threshold in FAR 15.804-2(a)(1) for submission of cost or pricing data.**

 Contracting officers can solicit bids and proposals electronically and permit contractors to submit bids and proposals electronically. When preparing a solicitation authorizing electronic offers, specify the electronic commerce method(s) that bidders may use. Also consider the impact of electronic data interchange on the time reasonably needed by offerors to prepare and submit offers — electronic commerce should speed up the the process of preparing and submitting offers. (§14.202-1, 14.202-2, 14.202-8, 14.203-1, and 15.402 ; FAC 90-29, 91-104)

14.202-1 Bidding time.

FAR as of FAC 90-25

(a) *Policy.* A reasonable time for prospective

FAR as revised

(a) *Policy.* A reasonable time for prospective

bidders to prepare and submit bids shall be allowed in all invitations, consistent with the needs of the Government. (For construction contracts, see 36.303(a).) A bidding time (i.e., the time between issuance of the solicitation and opening of bids) of at least 30 calendar days shall be provided, when synopsis is required by Subpart 5.2.

(b) *Factors to be considered.* Because of unduly limited bidding time, some potential sources may be precluded from bidding and others may be forced to include amounts for contingencies that, with additional time, could be eliminated. To avoid unduly restricting competition or paying higher-than-necessary prices, consideration shall be given to such factors as the following in establishing a reasonable bidding time: (1) degree of urgency; (2) complexity of requirement; (3) anticipated extent of subcontracting; (4) whether use was made of presolicitation notices; (5) geographic distribution of bidders; and (6) normal mailing time for both invitations and bids.

bidders to prepare and submit bids shall be allowed in all invitations, consistent with the needs of the Government. (For construction contracts, see 36.303(a).) A bidding time (i.e., the time between issuance of the solicitation and opening of bids) of at least 30 calendar days shall be provided, when synopsis is required by Subpart 5.2.

(b) *Factors to be considered.* Because of unduly limited bidding time, some potential sources may be precluded from bidding and others may be forced to include amounts for contingencies that, with additional time, could be eliminated. To avoid unduly restricting competition or paying higher-than-necessary prices, consideration shall be given to such factors as the following in establishing a reasonable bidding time: (1) degree of urgency; (2) complexity of requirement; (3) anticipated extent of subcontracting; (4) whether use was made of presolicitation notices; (5) geographic distribution of bidders; and (6) normal **transmittal** time for both invitations and bids. [FAC 90-29]

14.202-2 Telegraphic bids.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) Telegraphic bids and mailgrams shall be authorized only when—	(a) Telegraphic bids and mailgrams shall be authorized only when—
(1) The date for the opening of bids will not allow bidders sufficient time to submit bids on the prescribed forms ; or	(1) The date for the opening of bids will not allow bidders sufficient time to submit bids in the prescribed format ; or
(2) Prices are subject to frequent changes.	[FAC 90-29] (2) Prices are subject to frequent changes.

14.202-8 Electronic bids. [New]

In accordance with Subpart 4.5, contracting officers may authorize use of electronic commerce for submission of bids. If electronic bids are authorized, the solicitation shall specify the electronic commerce method(s) that bidders may use. [FAC 90-29]

14.203-1 Mailing or delivery to prospective bidders.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
Invitations for bids or presolicitation notices shall be mailed or delivered to prospective bidders as specified in 14.205, and shall be provided to others in accordance with 5.102. When a contracting office is located in the United States, any solicitation sent to a prospective bidder located at a foreign address	Invitations for bids or presolicitation notices shall be transmitted as specified in 14.205, and shall be provided to others in accordance with 5.102. When a contracting office is located in the United States, any solicitation sent to a prospective bidder

shall be sent by international air mail if security classification permits.

located at a foreign address shall be sent by **electronic data interchange** or international air mail if security classification permits. [FAC 90-29]

☞ Contracting officers do not have to maintain solicitation mailing lists when their electronic commerce software automatically transmits solicitations to all interested sources participating in electronic contracting with the contracting activity. (§14.205-1; FAC 90-29, 91-104)

14.205-1 Establishment of lists.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) Solicitation mailing lists shall be established by contracting activities to assure access to adequate sources of supplies and services. This rule need not be followed, however, when the requirements of the contracting office can be obtained within the local trade area through use of the small purchase procedures (see Part 13), or are nonrecurring. Lists may be established as (1) a central list for use by all contracting offices within the contracting activity, or (2) local lists maintained by each contracting office.	(a) Solicitation mailing lists shall be established by contracting activities to assure access to adequate sources of supplies and services. This rule need not be followed, however, when (1) the requirements of the contracting office can be obtained through use of simplified acquisition procedures (see Part 13), (2) the requirements are nonrecurring, or (3) electronic commerce methods are used which transmit solicitations or presolicitation notices automatically to all interested sources participating in electronic contracting with the purchasing activity. Lists may be established as a central list for use by all contracting offices within the contracting activity, or as local lists maintained by each contracting office. [FAC 90-29]

☞ When cancelling an IFB before opening, do not let anyone view electronic bids. Purge each bid and all related data received from the bidder from all data storage systems — both primary and backup. (§14.209; FAC 90-29, 91-104)

14.209 Cancellation of invitations before opening.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>***</p> <p>(b) When an invitation is cancelled, bids that have been received shall be returned unopened to the bidders and a notice of cancellation shall be sent to all prospective bidders to whom invitations were</p>	<p>***</p> <p>(b) When an invitation is cancelled, bids that have been received shall be returned unopened to the bidders and a notice of cancellation shall be sent to all prospective bidders to whom invitations were</p>

issued.

issued. **For bids received electronically, the data received shall not be viewed and shall be purged from primary and backup data storage systems.** [FAC 90-29]

☞ For an electronic bid to be responsive, the bidder must use the electronic commerce method specifically stipulated or permitted by the IFB. (§14.301 and 52.214-5; FAC 90-29, 91-104)

14.301 Responsiveness of bids.


<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) To be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system.</p> <p>* * * *</p> <p>(d) Bids should be filled out, executed, and submitted in accordance with the instructions in the invitation. If a bidder uses its own bid form or a letter to submit a bid, the bid may be considered only if (1) the bidder accepts all the terms and conditions of the invitation and (2) award on the bid would result in a binding contract with terms and conditions that do not vary from the terms and conditions of the invitation.</p>	<p>(a) To be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system.</p> <p>* * * *</p> <p>(d) Bids should be filled out, executed, and submitted in accordance with the instructions in the invitation. If a bidder uses its own bid form or a letter to submit a bid, the bid may be considered only if (1) the bidder accepts all the terms and conditions of the invitation and (2) award on the bid would result in a binding contract with terms and conditions that do not vary from the terms and conditions of the invitation.</p> <p>(e) Bids submitted by electronic commerce shall be considered only if the electronic commerce method was specifically stipulated or permitted by the solicitation. [FAC 90-29]</p>

52.214-5 Submission of Bids. * * * * (d) Bids submitted by electronic commerce shall be considered only if the electronic commerce method was specifically stipulated or permitted by the solicitation.

☞ IFBs may allow bidders to modify or withdraw bids by electronic messaging. If a bidder withdraws an electronic bid, purge the bid and all related data from all data storage systems — both primary and backup. . (§14.303; FAC 90-29, 91-104)

14.303 Modification or withdrawal of bids.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) Bids may be modified or withdrawn by written or telegraphic notice received in the office designated in the invitation for bids not later than the exact time set for opening of bids.</p> <p>* * * *</p>	<p>(a) Bids may be modified or withdrawn by any method authorized by the solicitation, if notice is received in the office designated in the solicitation not later than the exact time set for opening of bids. [FAC 90-29]</p> <p>* * * *</p> <p>(c) Upon withdrawal of an electronically transmitted bid, the data received shall not be viewed and shall be purged from primary and backup data storage systems. [FAC 90-29]</p>

 If submitted by an electronic commerce method authorized by the solicitation, do not consider an offer to be late if the Government received the offer “not later than 5:00 p.m. one working day prior to the date specified for receipt of” bids or proposals. (§14.304-1, 52.214-7, 52.214-23, 52.214-32, 52.214-33, 52.215-10, and 52.215-36; FAC 90-29, 91-104)

14.304-1 General.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>Bids received in the office designated in the invitation for bids after the exact time set for opening are “late bids.”</p> <p>(a) A late bid, modification of bid, or withdrawal of bid shall not be considered unless received before contract award, and either—</p> <p>* * * *</p> <p>(3) * * * * .</p>	<p>Bids received in the office designated in the invitation for bids after the exact time set for opening are “late bids.”</p> <p>(a) A late bid, modification of bid, or withdrawal of bid shall not be considered unless received before contract award, and —</p> <p>* * * *</p> <p>(3) * * * *; or</p> <p>(4) It was transmitted through an electronic commerce method authorized by the solicitation and was received by the Government not later than 5:00 p.m. one working day prior to the date specified for receipt of bids. [FAC 90-29]</p>

52.214-7 Late Submissions, Modifications, and Withdrawals of Bids.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
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(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it—

* * * *

(3) * * * * .

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it—

* * * *

(3) * * * *; or

(4) Was transmitted through an electronic commerce method authorized by the solicitation and was received by the Government not later than 5:00 p.m., one working day prior to the date specified for receipt of bids.

52.214-23 Late Submissions, Modifications, and Withdrawals of Technical Proposals under Two-Step Sealed Bidding.

FAR as of FAC 90-25

(a) Any technical proposal under step one of two-step sealed bidding received at the office designated in this solicitation after the exact time specified for receipt will not be considered unless it is received before the invitation for bids in step two is issued and it—

* * * *

(3) * * * * .

FAR as revised

(a) Any technical proposal under step one of two-step sealed bidding received at the office designated in this solicitation after the exact time specified for receipt will not be considered unless it is received before the invitation for bids in step two is issued and it—

* * * *

(3) * * * *; or

(4) Was transmitted through an electronic commerce method authorized by the solicitation and was received by the Government not later than 5:00 p.m. one working day prior to the date specified for receipt of technical proposals; or

52.214-32 Late Submissions, Modifications, and Withdrawals of Bids (Overseas).

FAR as of FAC 90-25

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it was sent by mail or, if authorized by the solicitation, was sent by telegram or via facsimile, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

* * * * *

FAR as revised

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it—

(1) Was sent by mail or, if authorized by the solicitation, was sent by telegram or via facsimile, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; **or**

(2) Was transmitted through an electronic commerce method authorized by the solicitation and was received by the


Government not later than 5:00 p.m. one working day prior to the date specified for receipt of bids. The term "working day" excludes weekends and U.S. Federal holidays. [FAC 90-29]

* * * * *

52.214-33 Late Submissions, Modifications, and Withdrawals of Technical Proposals under Two-Step Sealed Bidding (Overseas).

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) Any technical proposal under step one of two-step sealed bidding received at the office designated in this solicitation after the exact time specified for receipt will not be considered unless it is received before the invitation for bids in step two is issued and it—</p> <p>(1) Was sent (i) by mail, or (ii) if authorized by the solicitation, was sent by telegram (including mailgram) or via facsimile, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or</p> <p>(2) Is the only technical proposal received.</p> <p>* * * * *</p>	<p>(a) Any technical proposal under step one of two-step sealed bidding received at the office designated in this solicitation after the exact time specified for receipt will not be considered unless it is received before the invitation for bids in step two is issued and it—</p> <p>(1) Was sent (i) by mail, or (ii) if authorized by the solicitation, was sent by telegram (including mailgram) or via facsimile, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation;</p> <p>(2) Was transmitted through an electronic commerce method authorized by the solicitation and was received by the Government not later than 5:00 p.m. one working day prior to the date specified for receipt of technical proposals. The term "working day" excludes weekends and U.S. Federal holidays; or</p> <p>(3) Is the only technical proposal received.</p> <p>[FAC 90-29]</p>

* * * * *

 Keep electronic bids in a “secured, restricted-access electronic bid box” prior to opening. (§14.401; FAC 90-29, 91-104)

14.401 Receipt and safeguarding of bids.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) All bids (including modifications) received	(a) All bids (including modifications) received

before the time set for the opening of bids shall be kept secure. Except as provided in paragraph (b) below, the bids shall remain unopened in a locked bid box or safe. If an invitation for bids is cancelled, bids shall be returned to the bidders. Necessary precautions shall be taken to ensure the security of the bid box or safe. Before bid opening, information concerning the identity and number of bids received shall be made available only to Government employees. Such disclosure shall be only on a “need to know” basis. When bid samples are submitted, they shall be handled with sufficient care to prevent disclosure of characteristics before bid opening.

before the time set for the opening of bids shall be kept secure. Except as provided in paragraph (b) of this section, the bids shall not be opened or viewed, and shall remain in a locked bid box, a safe, or in a secured, restricted-access electronic bid box. If an invitation for bids is cancelled, bids shall be returned to the bidders. Necessary precautions shall be taken to ensure the security of the bid box or safe. Before bid opening, information concerning the identity and number of bids received shall be made available only to Government employees. Such disclosure shall be only on a “need to know” basis. When bid samples are submitted, they shall be handled with sufficient care to prevent disclosure of characteristics before bid opening. [FAC 90-29]

👉 If you have reason to believe that electronic bids from “an important segment of bidders” were lost because of problems with the Government’s telecommunications equipment or servers (e.g., power outages or software bugs), consider postponing bid opening so that bidders can electronically resubmit their bids. (§14.402-3; FAC 90-29, 91-104)

14.402-3 Postponement of openings.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) A bid opening may be postponed even after the time scheduled for bid opening (but otherwise in accordance with 14.208) when—</p> <p>(1) The contracting officer has reason to believe that the bids of an important segment of bidders have been delayed in the mails for causes beyond their control and without their fault or negligence (e.g., flood, fire, accident, weather conditions, or strikes); or</p>	<p>(a) A bid opening may be postponed even after the time scheduled for bid opening (but otherwise in accordance with 14.208) when—</p> <p>(1) The contracting officer has reason to believe that the bids of an important segment of bidders have been delayed in the mails, or in the communications system specified for transmission of bids, for causes beyond their control and without their fault or negligence (e.g., flood, fire, accident, weather conditions, strikes, or Government equipment blackout or malfunction when bids are due); or</p>

👉 Reject “unreadable” electronic bids unless the bidder provides clear and convincing evidence:

- Of the content of the bid as originally submitted; and

- That bid is unreadable because of a Government software or hardware error, malfunction, or other Government mishandling. (§14.406; FAC 90-29, 91-104)

An electronic bid is unreadable if you cannot determine whether the bid is responsive (i.e., conforms to the essential requirements of the IFB).

14.406 Receipt of an unreadable electronic bid. [Section added by FAC 90-29]

If a bid received at the Government facility by electronic data interchange is unreadable to the degree that conformance to the essential requirements of the invitation for bids cannot be ascertained, the contracting officer immediately shall notify the bidder that the bid will be rejected unless the bidder provides clear and convincing evidence—

- (a) Of the content of the bid as originally submitted; and
- (b) That the unreadable condition of the bid was caused by Government software or hardware error, malfunction, or other Government mishandling.

☞ When correcting apparent clerical mistakes in electronic bids, include as part of the electronic solicitation file:

- The original bid
- The verification request
- The bid verification.

(§14.407-2; FAC 90-29, 91-104)

14.407-2 Apparent clerical mistakes.


<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) Any clerical mistake, apparent on its face in the bid, may be corrected by the contracting officer before award. The contracting officer first shall obtain from the bidder a verification of the bid intended. Examples of apparent mistakes are—</p> <ul style="list-style-type: none"> (1) Obvious misplacement of a decimal point; (2) Obviously incorrect discounts (for example, 1 percent 10 days, 2 percent 20 days, 5 percent 30 days); (3) Obvious reversal of the price f.o.b. destination and price f.o.b. origin; and (4) Obvious mistake in designation of unit. <p>(b) Correction of the bid shall be effected by attaching the verification to the original bid and a copy of the verification to the duplicate bid. Correction shall not be made on the face of the bid; however, it shall be reflected in the award document.</p>	<p>(a) Any clerical mistake, apparent on its face in the bid, may be corrected by the contracting officer before award. The contracting officer first shall obtain from the bidder a verification of the bid intended. Examples of apparent mistakes are—</p> <ul style="list-style-type: none"> (1) Obvious misplacement of a decimal point; (2) Obviously incorrect discounts (for example, 1 percent 10 days, 2 percent 20 days, 5 percent 30 days); (3) Obvious reversal of the price f.o.b. destination and price f.o.b. origin; and (4) Obvious mistake in designation of unit. <p>(b) Correction of the bid shall be effected by attaching the verification to the original bid and a copy of the verification to the duplicate bid. Correction shall not be made on the face of the bid; however, it shall be reflected in the award document.</p>
<p style="text-align: center;">(c) Correction of bids submitted by electronic data interchange shall</p>	

be effected by including in the electronic solicitation file the original bid, the verification request, and the bid verification. [FAC 90-29]

(a) Any clerical mistake, apparent on its face in the bid, may be corrected by the contracting officer before award. The contracting officer first shall obtain from the bidder a verification of the bid intended. Examples of apparent mistakes are—

- (1) Obvious misplacement of a decimal point;
- (2) Obviously incorrect discounts (for example, 1 percent 10 days, 2 percent 20 days, 5 percent 30 days);
- (3) Obvious reversal of the price f.o.b. destination and price f.o.b. origin; and
- (4) Obvious mistake in designation of unit.

(b) Correction of the bid shall be effected by attaching the verification to the original bid and a copy of the verification to the duplicate bid. Correction shall not be made on the face of the bid; however, it shall be reflected in the award document.

 Contracting officers can use electronic rather than paper medium to transmit preaward notices, postaward notices, and notices of award. (§14.408-1, §14.409-1, Subpart 15.10, and §36.304; FAC 90-31, Case 94-701)

14.408-1 General.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) The contracting officer shall make a contract award (1) by written notice, (2) within the time for acceptance specified in the bid or an extension (see 14.404-1(d)), and (3) to that responsible bidder whose bid, conforming to the invitation, will be most advantageous to the Government, considering only price and the price-related factors (see 14.201-8) included in the invitation. Award shall not be made until all required approvals have been obtained and the award otherwise conforms with 14.103-2.</p> <p>* * * *</p> <p>(d)(1) Award is generally made by using the Award portion of Standard Form (SF) 33, Solicitation, Offer, and Award, or SF 1447, Solicitation/Contract (see 53.214). If an offer from a SF 33 leads to further changes, the resulting contract shall be prepared as a bilateral document on SF 26, Award/Contract.</p> <p>(2) Use of the Award portion of SF 33, SF 26, or SF 1447, does not preclude the additional use of informal documents, including telegrams, as notices of awards.</p>	<p>(a) The contracting officer shall make a contract award (1) by written or electronic notice, (2) within the time for acceptance specified in the bid or an extension (see 14.404-1(d)), and (3) to that responsible bidder whose bid, conforming to the invitation, will be most advantageous to the Government, considering only price and the price-related factors (see 14.201-8) included in the invitation. Award shall not be made until all required approvals have been obtained and the award otherwise conforms with 14.103-2.</p> <p>* * * *</p> <p>(d)(1) Award is generally made by using the Award portion of Standard Form (SF) 33, Solicitation, Offer, and Award, or SF 1447, Solicitation/Contract (see 53.214). If an offer from a SF 33 leads to further changes, the resulting contract shall be prepared as a bilateral document on SF 26, Award/Contract.</p> <p>(2) Use of the Award portion of SF 33, SF 26, or SF 1447, does not preclude the additional use of informal documents, including telegrams or electronic transmissions, as notices of awards.</p>

☞ Notify unsuccessful offerors within three days after award. (§14.409-1, §15.1002, FAC 90-31, Case 94-701)

14.409-1 Award of unclassified contracts.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a)(1) The contracting officer shall as a minimum (subject to any restrictions in Subpart 9.4)—</p> <p>(i) Notify unsuccessful bidders promptly that their bids were not accepted;</p> <p>(ii) Extend appreciation for the interest the unsuccessful bidders have shown in submitting a bid; and</p> <p>(iii) When award is made to other than a low bidder, state the reason for rejection in the notice to each of the unsuccessful low bidders.</p> <p>(2) For acquisitions subject to the Trade Agreements Act or the North American Free Trade Agreement (NAFTA) Implementation Act (see 25.405(e)), agencies shall promptly, but in no event later than 7 working days after award, give unsuccessful offerors from designated or NAFTA countries written notice stating—</p> <p>—(i) That their offers were not accepted;</p> <p>—(ii) That a contract has been awarded;</p> <p>—(iii) The dollar amount of the successful offer; and</p> <p>—(iv) The name and address of the successful offeror.</p> <p>(b) Notification to unsuccessful bidders may be oral or in writing through the use of a form postal card or other appropriate means.</p> <p>(c) Should additional information be requested, the contracting officer shall provide the unsuccessful bidders with the name and address of the successful bidder, the contract price, and the location where a copy of the abstract of offers is available for inspection. However, when multiple awards have been made and furnishing information on the successful bids would require so much work as to interfere with normal operations of the contracting office, only information concerning location of the abstract of offers need be given.</p>	<p>(a)(1) The contracting officer shall as a minimum (subject to any restrictions in Subpart 9.4)—</p> <p>(i) Notify each unsuccessful bidder in writing or electronically within three days after contract award, that its bid was not accepted. "Day", for purposes of the notification process, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday;</p> <p>(ii) Extend appreciation for the interest the unsuccessful bidder has shown in submitting a bid; and</p> <p>(iii) When award is made to other than a low bidder, state the reason for rejection in the notice to each of the unsuccessful low bidders.</p> <p>(2) For acquisitions subject to the Trade Agreements Act or the North American Free Trade Agreement (NAFTA) Implementation Act (see 25.405(e)), agencies shall include in notices given unsuccessful bidders from designated or NAFTA countries—</p> <p>(i) The dollar amount of the successful bid; and</p> <p>(ii) The name and address of the successful bidder.</p> <p>(b) Information included in paragraph (a)(2) of this subsection shall be provided to any unsuccessful bidder upon request except when multiple awards have been made and furnishing information on the successful bids would require so much work as to interfere with normal operations of the contracting office. In such circumstances, only information concerning location of the abstract of offers need be given.</p>

(d) When a request is received concerning an unclassified invitation from an inquirer who is neither a bidder nor a representative of a bidder, the contracting officer should make every effort to furnish the names of successful bidders and, if requested, the prices at which awards were made. However, when such requests require so much work as to interfere with the normal operations of the contracting office, the inquirer will be advised where a copy of the abstract of offers may be seen.

(e) Requests for records shall be governed by agency regulations implementing Subpart 24.2.

(c) When a request is received concerning an unclassified invitation from an inquirer who is neither a bidder nor a representative of a bidder, the contracting officer should make every effort to furnish the names of successful bidders and, if requested, the prices at which awards were made. However, when such requests require so much work as to interfere with the normal operations of the contracting office, the inquirer will be advised where a copy of the abstract of offers may be seen.

(d) Requests for records shall be governed by agency regulations implementing Subpart 24.2.

PART 15

CONTRACTING BY NEGOTIATION

✎ The Comptroller General’s right of access to contractor records is established by the clauses at 52.214-26 and 52.215-2 — the clause at 52.215-1 is reserved. The clause at 52.215-2 also stresses that this right of access “may not be construed to require the Contractor or subcontractor to create or maintain any record that the Contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law”. (§4.702, 15.106-1, 25.901, 52.214-26, and 52.215-2, FAC 90-31, Case 94-740)

~~15.106-1 Examination of Records clause.~~

- ~~—(a) This subsection implements 10 U.S.C. 2313(b) and (c) and 41 U.S.C. 254(c).~~
- ~~—(b) When contracting by negotiation, the contracting officer shall insert the clause at 52.215-1, Examination of Records by Comptroller General, in solicitations and contracts, except when—~~
 - ~~—(1) Making small purchases (see Part 13);~~
 - ~~—(2) Contracting for utility services at rates not exceeding those established to apply uniformly to the public, plus any applicable reasonable connection charge; or~~
 - ~~—(3) Making contracts with foreign contractors for which the agency head authorizes omission under Subpart 25.9.~~
- ~~—(c) In connection with administration of the clause in research and development contracts with nonprofit institutions, including subcontracts under these contracts, the Comptroller General does not require original documentation of transportation costs (exclusive of travel).~~

✎ The FAR redefines the term “records” to include not only books and documents but also “accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.” (§4.703, 52.214-26, and 52.215-2; FAC 90-31, Case 94-740)

- ✎ Contractors only have to incorporate the audit and records clause at 52.215-2 in subcontracts that exceed the simplified acquisition threshold and:
- That are cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable type or any combination of these;
 - For which cost or pricing data are required; or
 - That require the subcontractor to furnish reports as discussed in paragraph (e) of this clause.

This conforms the audit rights at the subcontract level with those at the prime contract level. (52.215-2; FAC 90-31, Case 94-740)

✎ A new Alternate III to the clause at FAR 52.215-2 waives the Comptroller General’s right to examine the records of foreign contractors. Do not automatically waive that right. Rather, the FAR requires every reasonable effort to negotiate incorporation of the “basic” clause at FAR 52.215-2 with the Comptroller’s right of access intact — and the FAR maintains essentially the same controls on waivers that formerly applied to decisions about omitting the clause at 52.215-1. (§25.901 and 52.215-2; FAC 90-31, Case 94-740).

15.106-1 Audit and Records—Negotiation clause.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
15.106-2 Audit—Negotiation clause.	(a) This subsection implements 10 U.S.C. 2313, 41 U.S.C. 254d, and OMB Circular No. A-133.
(a) This subsection implements 10 U.S.C. 2313(a), 41 U.S.C. 254(b), 40 U.S.C. 2306(f) , and OMB Circular No. A-133.	
(b) The contracting officer shall, when contracting by negotiation, insert the clause at 52.215-2, Audit—Negotiation, in solicitations and contracts, unless the acquisition is a small purchase under Part 13.	(b) The contracting officer shall, if contracting by negotiation, insert the clause at 52.215-2, Audit and Records—Negotiation , in solicitations and contracts except those (1) not exceeding the simplified acquisition threshold in Part 13; or (2) for utility services at rates not exceeding those established to apply uniformly to the general public, plus any applicable reasonable connection charge.
In facilities contracts, the contracting officer shall use the clause with its Alternate I. In cost-reimbursement contracts with educational institutions and other nonprofit organizations, the contracting officer shall use the clause with its Alternate II.	(c) In facilities contracts, the contracting officer shall use the clause with its Alternate I. In cost-reimbursement contracts with educational institutions and other nonprofit organizations, the contracting officer shall use the clause with its Alternate II. If the examination of records by the Comptroller General is waived in accordance with 25.901, the contracting officer shall use the clause with its Alternate III.

52.215-2 Audit and Records—Negotiation.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
	(a) As used in this clause, <i>records</i> includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.
(a) <i>Examination of costs.</i> If this is a cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable contract, or any combination of these, the Contractor shall	(b) <i>Examination of costs.</i> If this is a cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable contract, or any combination of these, the Contractor shall maintain

maintain—and the Contracting Officer or representatives of the Contracting Officer shall have the right to examine and audit—~~books, records, documents, and other evidence and accounting procedures and practices, regardless of form (e.g., machine readable media such as disk, tape, etc.) or type (e.g., data bases, applications software, data base management software, utilities, etc.);~~ sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred in performing this contract. This right of examinations shall include inspection at all reasonable times of the Contractor's plants, or parts of them, engaged in performing the contract.

(b) *Cost or pricing data.* If, ~~pursuant to law,~~ the Contractor has been required to submit cost or pricing data in connection with pricing this contract ~~or any modification to this contract,~~ the Contracting Officer or representatives of the Contracting Officer ~~who are employees of the Government~~ shall have the right to examine and audit all of the Contractor's ~~books, records, documents, and other data, regardless of form (e.g., machine readable media such as disk, tape, etc.) or type (e.g., data bases, applications software, data base management software, utilities, etc.);~~ including computations and projections, related to proposing, negotiating, pricing, or performing the contract or modification, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data. ~~The right of examination shall extend to all documents necessary to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used.~~

(c) *Reports.* If the Contractor is required to furnish cost, funding, or performance reports, the Contracting Officer or representatives of the Contracting Officer ~~who are employees of the Government~~ shall have the right to examine and

and the Contracting Officer, or **an authorized** representative of the Contracting Officer, shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this contract. This right of examination shall include inspection at all reasonable times of the Contractor's plants, or parts of them, engaged in performing the contract.

(c) *Cost or pricing data.* If the Contractor has been required to submit cost or pricing data in connection with **any pricing action relating to** this contract, the Contracting Officer, or **an authorized** representative of the Contracting Officer, **in order** to evaluate the accuracy, completeness, and currency of the cost or pricing data, shall have the right to examine and audit all of the Contractor's records, including computations and projections, related to—

- (1) The proposal for the contract, subcontract, or modification;
- (2) The discussions conducted on the proposal(s), including those related to negotiating;
- (3) Pricing of the contract, subcontract, or modification; or
- (4) Performance of the contract, subcontract or modification.

(d) *Comptroller General*—(1) **The Comptroller General of the United States, or an authorized representative, shall have access to and the right to examine any of the Contractor's directly pertinent records involving transactions related to this contract or a subcontract hereunder.**

(2) **This paragraph may not be construed to require the Contractor or subcontractor to create or maintain any record that the Contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.**

(e) *Reports.* If the Contractor is required to furnish cost, funding, or performance reports, the Contracting Officer or **an authorized** representative of the Contracting Officer shall have the right to examine and audit the supporting records

audit books, records, other documents, and supporting materials, for the purpose of evaluating (1) the effectiveness of the Contractor's policies and procedures to produce data compatible with the objectives of these reports and (2) the data reported.

(d) *Availability.* The Contractor shall make available at its office at all reasonable times the materials described in paragraphs (a) and (b) ~~above~~, for examination, audit, or reproduction, until 3 years after final payment under this contract, or for any shorter period specified in Subpart 4.7, Contractor Records Retention, of the Federal Acquisition Regulation (FAR), or for any longer period required by statute or by other clauses of this contract. In addition—

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement; and

(2) Records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are ~~disposed of~~.

~~(e) Except as otherwise provided in FAR Subpart 4.7, Contractor Records Retention, the Contractor may transfer computer data in machine readable form from one reliable computer medium to another. The Contractor's computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original data. The contractor's choice of form or type of materials described in paragraphs (a), (b), and (c) of this clause affects neither the Contractor's obligations nor the Government's rights under this clause.~~

(f) The Contractor shall insert a clause containing all the terms of this clause, including this paragraph (f), in all subcontracts under this contract that ~~are over the small purchase limitation in FAR Part 13, altering the clause only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.~~

and materials, for the purpose of evaluating (1) the effectiveness of the Contractor's policies and procedures to produce data compatible with the objectives of these reports and (2) the data reported.

(f) *Availability.* The Contractor shall make available at its office at all reasonable times the records, materials, and other evidence described in paragraphs (a), (b), **(c), (d), and (e) of this clause**, for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in Subpart 4.7, Contractor Records Retention, of the Federal Acquisition Regulation (FAR), or for any longer period required by statute or by other clauses of this contract. In addition—

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement; and

(2) Records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are **finally resolved**.

(g) The Contractor shall insert a clause containing all the terms of this clause, including this paragraph (g), in all subcontracts under this contract that **exceed the simplified acquisition threshold** in FAR Part 13, and—

(1) That are cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable type or any combination of these;

(2) For which cost or pricing data are required; or

(3) That require the subcontractor to furnish reports as discussed in paragraph (e) of this clause.

The clause may be altered only as necessary to

identify properly the contracting parties and the Contracting Officer under the Government prime contract.

Alternate I (APR 1984). In facilities contracts, add the following sentence at the end of paragraph (a) of the basic clause:

The obligations and rights specified in this paragraph shall extend to the use of, and charges for the use of, the facilities under this contract.

Alternate II (FEB 1993). In cost-reimbursement contracts with educational and other nonprofit institutions, add the following paragraph (g) to the basic clause:

(g) The provisions of OMB Circular No. A-133 "Audits of Institutions of Higher Learning and Other Nonprofit Institutions" apply to this contract.

Alternate I (OCT 1995). **As prescribed in 15.106-1(c)**, in facilities contracts, add the following sentence at the end of paragraph (b) of the basic clause:

The obligations and rights specified in this paragraph shall extend to the use of, and charges for the use of, the facilities under this contract.

Alternate II (OCT 1995). **As prescribed in 15.106-1(c)**, in cost-reimbursement contracts with educational and other non-profit institutions, add the following paragraph (h) to the basic clause:

(h) The provisions of OMB Circular No. A-133, "Audits of Institutions of Higher Learning and Other Nonprofit Institutions," apply to this contract.

Alternate III (OCT 1995). **As prescribed in 15.106-1(c), delete paragraph (d) of the basic clause and redesignate the remaining paragraphs accordingly.**

☞ Contracting officers can solicit bids and proposals electronically and permit contractors to submit bids and proposals electronically. When preparing a solicitation authorizing electronic offers, specify the electronic commerce method(s) that bidders may use. Also consider the impact of electronic data interchange on the time reasonably needed by offerors to prepare and submit offers — electronic commerce should speed up the the process of preparing and submitting offers. (§14.202-1, 14.202-2, 14.202-8, 14.203-1, and 15.402 ; FAC 90-29, 91-104)

15.402 General.

(k) In accordance with Subpart 4.5, contracting officers may authorize use of electronic commerce for submission of offers. If electronic offers are authorized, the solicitation shall specify the electronic commerce method(s) that offerors may use. [FAC 90-29]

☞ You may instruct offerors to package and submit past performance data separate and apart from pricing information and, if needed, technical data. (§15.406-5 Part IV, FAC 90-26).

☞ Contracting officers must state **all significant** evaluation factors and subfactors in requests for proposals. (FAC 90-31, Case 94-701) *See also 15.605(d).*

15.406-5 Part IV—Representations and instructions.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(b) <i>Section L, Instructions, conditions, and notices to offerors or quoters.</i> Insert in this section solicitation provisions and other information and instructions not required elsewhere to guide offerors or quoters in preparing proposals or quotations. Any alteration pertaining to the solicitation shall be included in this section as part of the provision at 52.252-3, Alterations in Solicitation. Prospective offerors or quoters may be instructed to submit technical proposals in severable parts to meet agency requirements. The severable parts should provide for separation of technical and cost or pricing data. The instructions may specify further organization of proposal or quotation parts, such as (1) administrative, (2) management, (3) technical, and (4) cost or pricing data.</p>	<p>(b) <i>Section L, Instructions, conditions, and notices to offerors or quoters.</i> Insert in this section solicitation provisions and other information and instructions not required elsewhere to guide offerors or quoters in preparing proposals or quotations. Any alteration pertaining to the solicitation shall be included in this section as part of the provision at 52.252-3, Alterations in Solicitation. Prospective offerors or quoters may be instructed to submit technical proposals in severable parts to meet agency requirements. The severable parts should provide for separation of cost or pricing <u>data, past performance data and, when needed, technical data</u>. The instructions may specify further organization of proposal or quotation parts, such as (1) administrative, (2) management, (3) technical, (4) <u>past performance</u>, and (5) cost or pricing data. <u>[FAC 90-26]</u></p>
<p>(c) <i>Section M, Evaluation factors for award.</i> Identify all factors, including cost or price, cost or price-related factors, and non-cost or non-price-related factors, and any significant subfactors that will be considered in awarding the contract (see 15.605(e) and (f) and the multiple award provision at 52.215-34) and state the relative importance the Government places on those evaluation factors and subfactors.</p>	<p>(c) <i>Section M, Evaluation factors for award.</i> Identify all significant factors, including cost or price, cost or price-related factors, and non-cost or non-price-related factors, and any significant subfactors that will be considered in awarding the contract (see 15.605(d) and (e) and the multiple award provision at 52.215-34) and state the relative importance the Government places on those evaluation factors and subfactors. <u>[FAC 90-31]</u></p>

☞ Whenever firms on a mailing list fail to submit an offer in response to a solicitation, the clauses at 52.214-9 and 52.215-15 require them to notify the contracting officer of their desire to continue receiving solicitations for such requirements. Absent such notice, the FAR allows contracting officers to strike their names from the mailing list. The FAR will now permit offerors to deliver the notice electronically rather than on paper. Moreover, contracting officers will not incorporate the clauses at 52.214-9 or 52.215-15 if they solicit offers through electronic data interchange methods that do not require the keeping of solicitation mailing lists. (§14.201-6, 15.407, 52.214-9 and 52.215-15; FAC 90-29, Case 91-104)

15.407 Solicitation provisions.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(d) The contracting officer shall—	(d) The contracting officer shall—

- (1) Insert in RFP's for other than construction the provision at 52.215-13, Preparation of Offers;
 - (2) Insert in RFP's the provision at 52.215-14, Explanation to Prospective Offerors;
 - (3) Insert in RFP's the provision at 52.215-15, Failure to Submit Offer; and
- * * * * *

- (1) Insert in RFP's for other than construction the provision at 52.215-13, Preparation of Offers;
 - (2) Insert in RFP's the provision at 52.215-14, Explanation to Prospective Offerors;
 - (3) Insert in RFP's the provision at 52.215-15, Failure to Submit Offer, **except when using electronic data interchange methods not requiring solicitation mailing lists**; and [FAC 90-29]
- * * * * *

52.215-15 Failure to Submit Offer.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
Recipients of this solicitation not responding with an offer should not return this solicitation, unless it specifies otherwise. Instead, they should advise the issuing office by letter or postcard whether they want to receive future solicitations for similar requirements. If a recipient does not submit an offer and does not notify the issuing office that future solicitations are desired, the recipient's name may be removed from the applicable mailing list.	Recipients of this solicitation not responding with an offer should not return this solicitation, unless it specifies otherwise. Instead, they should advise the issuing office by letter, postcard, or established electronic commerce methods , whether they want to receive future solicitations for similar requirements. If a recipient does not submit an offer and does not notify the issuing office that future solicitations are desired, the recipient's name may be removed from the applicable mailing list.

☞ When award will be on the basis of competitive proposals, determine whether to incorporate the award clause at FAR 52.215-16 with or without Alternate II. Generally reserve the right to award without discussions by using Alternate II. The advantage of Alternate II: Initial proposals are likely to more realistic. Use the clause without the Alternate when discussions are clearly inevitable (e.g., when the contemplated contract type is cost reimbursable). (FAC 90-31, Case 94-701)

☞ For civilian agencies, FAR 52.215-16, Alternate II, expands the Government's right to award without discussions. Under the previous award clause at 52.215-16, the Government's right to award without discussions had been greatly limited in case law. Basically, the Comptroller General only allowed award without discussions when (1) the RFP provided for award to the lowest priced offer in the competitive range and (2) the contracting officer had no reason to believe that discussions would yield a better price. Now, you can award without discussions even in "greatest value" competitions and trade-off the costs of conducting discussions against the possibility of seeing some slight improvement in BAFO prices vis-à-vis those initially proposed.

For DoD, NASA, and Coast Guard, the new Alternate II replaces the prior Alternate III — with no essential change in language. The language of the former Alternate II is now part of the basic provision. (FAC 90-31, Case 94-701)


15.407 Solicitation provisions.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(d) The contracting officer shall— * * * *	(d) The contracting officer shall— * * * *
4) Insert in RFP's the provision at 52.215-16, Contract Award.	(4) Insert in RFP's the provision at 52.215-16, Contract Award.
(i) Civilian agencies, other than the Coast Guard and the National Aeronautics and Space Administration, shall use the basic provision as stated.	(i) If the RFP is for construction, the contracting officer shall use the provision with its Alternate I. If awards are to be made without discussions, also use Alternate II.
(ii) If the RFP is for construction, the contracting officer shall use the provision with its Alternate I.	(ii) If the contracting officer intends to evaluate offers and make award without discussions, use the basic provision with its Alternate II.
(iii) The Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration shall use the basic provision with its Alternate II if the contracting officer intends that proposals will be evaluated with, and award made after, discussions with the offerors.	
(iv) The Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration shall use the basic provision with its Alternate III if the contracting officer intends that proposals will be evaluated, and award made, without discussions with offerors.	

52.215-16 Contract Award.


<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
* * * *	* * * *
(c) The Government may award a contract on the basis of initial offers received, without discussions. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. * * * *	(c) The Government intends to evaluate proposals and award a contract after conducting written or oral discussions with all responsible offerors whose proposals have been determined to be within the competitive range. However, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. * * * *
	<u>Alternate II</u> (SEPT 1995). As prescribed in 15.407(d)(4)(ii), substitute the following paragraph (c) for paragraph (c) of the basic provision:
	(c) The Government intends to evaluate proposals and award a contract without discussions with offerors (except communications conducted for the purpose of minor clarification). Therefore, each initial offer should contain the offeror's best terms from a cost or price and

technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary.

 Contracting officers may use electronic data interchange to notify prospective offerors of any change to the closing date for submitting proposals. (§15.410, FAC 90-29, Case 91-104)

15.410 Amendment of solicitations before closing date.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>*****</p> <p>(b) The contracting officer shall determine if the closing date needs to be changed when amending a solicitation. If the time available before closing is insufficient, prospective offerors or quoters shall be notified by telegram or telephone of an extension of the closing date, and the notification shall be confirmed in the written amendment to the solicitation. The contracting officer shall not award a contract unless any amendments made to an RFP have been issued in sufficient time to be considered by prospective offerors.</p>	<p>*****</p> <p>(b) The contracting officer shall determine if the closing date needs to be changed when amending a solicitation. If the time available before closing is insufficient, prospective offerors or quoters shall be notified by electronic data interchange, telegram, or telephone of an extension of the closing date. Telephonic and telegraphic notices shall be confirmed in the written amendment to the solicitation. The contracting officer shall not award a contract unless any amendments made to an RFP have been issued in sufficient time to be considered by prospective offerors.</p>

 If an offeror withdraws an electronically transmitted proposal, purge the proposal and all related data from all data storage systems — both primary and backup. . (§15.412; FAC 90-29, Case 91-104)

15.412 Late proposals, modifications, and withdrawals of proposals.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>*****</p> <p>(d) When a late proposal or modification is received and it is clear from available information that it cannot be considered for award, the contracting officer shall promptly notify the offeror that it was received late and will not be considered. The notice need not be given when the proposed contract is to be awarded within a few days and the notice prescribed in 15.1001(c)(1) would suffice.</p>	<p>*****</p> <p>(d) When a late proposal or modification is received and it is clear from available information that it cannot be considered for award, the contracting officer shall promptly notify the offeror that it was received late and will not be considered. The notice need not be given when the proposed contract is to be awarded within a few days and the notice prescribed in 15.1002(c)(1) would suffice. [FAC 90-31]</p> <p>*****</p>

(h) Upon withdrawal of an

electronically transmitted proposal, the data received shall not be viewed and shall be purged from primary and backup data storage systems.

☞ Cognizant technical officials are responsible both for technical and past performance requirements related to the source selection process. (FAC 90-26)

15.604 Responsibilities.

(a) Agency heads or their designees are responsible for source selection.

(b) The cognizant technical official is responsible for the technical requirements related to the source selection process.

(c) The contracting officer is responsible for contractual actions related to the source selection process, including—

(1) Issuing solicitations to which this subpart applies in accordance with Subpart 15.4 and this subpart;

(2) Conducting or coordinating cost or price analyses as prescribed in Subpart 15.8;

(3) Conducting or controlling all negotiations concerning cost or price, technical requirements, and other terms and conditions; and

(4) Selecting the source for contract award, unless another official is designated as the source selection authority.

(a) Agency heads or their designees are responsible for source selection.

(b) The cognizant technical official is responsible for the technical **and past performance requirements** related to the source selection process. [FAC 90-26]

(c) The contracting officer is responsible for contractual actions related to the source selection process, including—

(1) Issuing solicitations to which this subpart applies in accordance with Subpart 15.4 and this subpart;

(2) Conducting or coordinating cost or price analyses as prescribed in Subpart 15.8;

(3) Conducting or controlling all negotiations concerning cost or price, technical requirements, **past performance**, and other terms and conditions; and [90-26]

(4) Selecting the source for contract award, unless another official is designated as the source selection authority.

Past Performance and Quality

☞ Contracting officers must evaluate “past performance” in every competitive negotiation if the estimated value of the requirement exceeds:

- \$1,000,000 for solicitations issued on or after July 1, 1995.
- \$500,000 for solicitations issued on or after July 1, 1997
- \$100,000 for solicitations issued on or after January 1, 1999.

Exception: You do not have to evaluate past performance if the contracting officer documents the rationale for disregarding past performance in the contract file. [§15.605, FAC 90-26]

☞ Contracting officers must also consider quality in **every** source selection, through inclusion in one or more non-price factors (e.g., past performance, technical excellence, management capability, personnel qualifications, prior experience, and schedule compliance). [§15.605, FAC 90-26]

Environmental Objectives

☞ Contracting officers must consider “environmental objectives” in every source selection “where appropriate”. Possible objectives: “promoting waste reduction, source reduction, energy efficiency, and maximum practicable recovered material content” [§15.605, FAC 90-27]

Award On Low Price or Cost

☞ The FAR reaffirms that contracting officers may continue to award contracts, where appropriate, on the basis of lowest [evaluated] price or cost to responsible offerors whose offers meet the solicitation’s minimum criteria for acceptable award. Remember to state this basis of award in the solicitation. (§15.605, FAC 90-31, Case 94-701)

In this context, you generally may not use responsibility-related factors (e.g., past performance) other than for responsibility determinations, and such determinations are subject to “Certificate of Competency” review by the Small Business Administration.

Greatest Value Competitions

☞ Numerical weights are NOT mandated (or encouraged) by the FAR. The FAR reaffirms that numerical weights can be used — and do not necessarily have to be disclosed in the RFP. Contracting officers may disclose numerical weights “on a case by case basis” in the solicitation. Although the new FAR language does not discourage this practice, disclosing weights generally is NOT good practice. The Comptroller General has repeatedly ruled that Source Selection Authorities have discretion to overrule numerical scores when weights are NOT disclosed in the solicitation. (§15.605, FAC 90-31, Case 94-701)

Incorporating Evaluation Factors in RFPs

☞ Contracting officers no longer have to state **all** evaluation factors in requests for proposals — only the **significant** factors. (FAC 90-31, Case 94-701) *See also §15.406-5.*

☞ RFPs must directly, expressly state whether:

Non-Price evaluation factors (taken as a whole) are ...



- Significantly more important than, **or**
- Approximately equal in importance to, **or**
- Significantly less important than ...



Cost or price.

Insert this language as the prelude in Section M (when using the UCF). (FAC 90-31, Case 94-701)

15.605 Evaluation factors and subfactors.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) The factors that will be considered in evaluating proposals should be tailored to each acquisition and include only those factors that will have an impact on the source selection decision.	(a) The factors and subfactors that will be considered in evaluating proposals shall be tailored to each acquisition and shall include only those factors that will have an impact on the source selection decision. [FAC 90-31]
(b) The evaluation factors that apply to an acquisition and the relative importance of those factors are within the broad discretion of agency acquisition officials. However , price or cost to the Government shall be included as an evaluation factor in every source selection.	(b) The evaluation factors and subfactors that apply to an acquisition and the relative importance of those factors and subfactors are within the broad discretion of agency acquisition officials except that— [FAC 90-26] [FAC 90-31] <p>(i) Price or cost to the Government shall be included as an evaluation factor in every source selection. [FAC 90-26]</p> <p>(ii) <u>Past performance shall be evaluated in all competitively negotiated acquisitions expected to exceed \$100,000 not later than January 1, 1999, unless the contracting officer documents in the contract file the reasons why past performance should not be evaluated. Agencies may develop their own phase-in schedule for past performance evaluations which meets or exceeds the following milestones: All solicitations with an estimated value in excess of (A) \$1,000,000 issued on or after July 1, 1995; (B) \$500,000 issued on or after July 1, 1997; and (C) \$100,000 issued on or after January 1, 1999. Past performance may be evaluated in competitively negotiated acquisitions estimated at \$100,000 or less at the discretion of the contracting</u></p>

Quality also shall be addressed in every source selection. In evaluation factors, quality may be expressed in terms of technical excellence, management capability, personnel qualifications, prior experience, past performance, and schedule compliance.

Any other relevant factors, such as cost realism, may also be included.

(c) While the lowest price or lowest total cost to the Government is properly the deciding factor in many source selections, in certain acquisitions the Government may select the source whose proposal offers the greatest value to the Government in terms of performance and other factors. This may be the case, for example, in the acquisition of research and development or professional services, or when cost-reimbursement contracting is anticipated.

(d) In awarding a cost-reimbursement contract, the cost proposal should not be controlling, since advance estimates of cost may not be valid indicators of final actual costs. There is no requirement that cost-reimbursement contracts be awarded on the basis of lowest proposed cost, lowest proposed fee, or the lowest total proposed cost plus fee. The award of cost-reimbursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The primary consideration should be which offeror can perform the contract in a manner most advantageous to the Government, as determined by evaluation of proposals according to the established evaluation criteria.

(e) The solicitation shall clearly state the evaluation factors, including cost or price, cost or

officer. [FAC 90-26]

(iii) Quality shall be addressed in every source selection **through inclusion in one or more of the non-cost** evaluation factors or subfactors, **such as past performance**, technical excellence, management capability, personnel qualifications, prior experience, and schedule compliance. [FAC 90-26 and 31]

(iv) **Environmental objectives, such as promoting waste reduction, source reduction, energy efficiency, and maximum practicable recovered material content (see Part 23), shall also be considered in every source selection, when appropriate.** [FAC 90-27]

(2) Any other relevant factors or subfactors, such as cost realism, may also be included. [FAC 90-26 and 31]

(dc) In awarding a cost-reimbursement contract, the cost proposal should not be controlling, since advance estimates of cost may not be valid indicators of final actual costs. There is no requirement that cost-reimbursement contracts be awarded on the basis of lowest proposed cost, lowest proposed fee, or the lowest total proposed cost plus fee. The award of cost-reimbursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The primary consideration should be which offeror can perform the contract in a manner most advantageous to the Government, as determined by evaluation of proposals according to the established evaluation criteria.

(e)d(1) The solicitation should be structured to provide for the selection of the source whose

price-related factors, and non-cost or non-price-related factors, and any significant subfactors, that will be considered in making the source selection and their relative importance (see 15.406-5(c)). Numerical weights, which may be employed in the evaluation of proposals, need not be disclosed in solicitations. The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors and significant subfactors.

proposal offers the greatest value to the Government in terms of performance, risk management, cost or price, and other factors. At a minimum, the solicitation shall clearly state the significant evaluation factors, such as cost or price, cost or price-related factors, past performance and other non-cost or non-price-related factors, and any significant subfactors, that will be considered in making the source selection, and their relative importance (see 15.406-5(c)). Numerical weights, which may be employed in the evaluation of proposals, need not be disclosed in solicitations. The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors and significant subfactors.

Further, the solicitation shall state whether all evaluation factors other than cost or price, when combined, are

(i) Significantly more important than cost or price,

(ii) Approximately equal to cost or price, or

(iii) Significantly less important than cost or price.

(2) The solicitation may elaborate on the relative importance of factors and subfactors at the discretion of the contracting officer. Agencies may elect to assign numerical weights to evaluation factors and employ those weights when evaluating proposals. Numerical weights need not be disclosed in solicitations; however, nothing precludes an agency from disclosing the weights on a case-by-case basis. The solicitation may state that award will be made to the offeror that meets the solicitation's minimum criteria for acceptable award at the lowest cost or price.

(f) In addition to other factors, offers will be evaluated on the basis of advantages and disadvantages to the Government that might result from making more than one award (see 15.407(h)). The contracting officer shall assume for the purpose of making multiple awards that \$500 would be the administrative cost to the Government for issuing and administering each contract awarded under a

(fe) In addition to other factors, offers will be evaluated on the basis of advantages and disadvantages to the Government that might result from making more than one award (see 15.407(h)). The contracting officer shall assume for the purpose of making multiple awards that \$500 would be the administrative cost to the Government for issuing and administering each contract awarded under a

solicitation. Individual awards shall be for the items or combination of items that result in the lowest aggregate cost to the Government, including the assumed administrative costs.

solicitation. Individual awards shall be for the items or combination of items that result in the lowest aggregate cost to the Government, including the assumed administrative costs.

☞ If an electronic proposal is “unreadable”, immediately notify the offeror and provide the offeror with an opportunity to submit clear and convincing evidence:

- Of the content of the proposal as originally submitted; and
- That the proposal is unreadable because of a Government software or hardware error, malfunction, or other Government mishandling.

An electronic proposal is unreadable if you cannot determine whether it conforms to the essential requirements of the solicitation. (§15.607; FAC 90-29, Case 91-104)

15.607 Disclosure of mistakes before award.

FAR as of FAC 90-25

* * * * *

FAR as revised

* * * * *

(d) If a proposal received at the Government facility in electronic format is unreadable to the degree that conformance to the essential requirements of the solicitation cannot be ascertained from the document, the contracting officer immediately shall notify the offeror and provide the opportunity for the offeror to submit clear and convincing evidence—

(1) Of the content of the proposal as originally submitted; and

(2) That the unreadable condition of the proposal was caused by Government software or hardware error, malfunction, or other Government mishandling. [FAC 90-29]

☞ When awarding on the basis of lowest evaluated price or cost with consideration limited to offers that satisfy the solicitations’ minimum criteria for acceptable award, generally you may NOT use responsibility-related factors (e.g., past performance) other than for responsibility determinations. Such responsibility determinations are subject to “Certificate of Competency” review by the Small Business Administration. In best value source selections, a comparative assessment of past performance is distinct and different from the responsibility determination under FAR §9.103 and not subject to “Certificate of Competency” reviews. (§15.608, FAC 90-26).

☞ When evaluating past performance information, consider such issues as:

- The number and severity of an offeror's problems,
- Effectiveness of corrective actions taken by the offeror,
- The offeror's overall work record.
- Age and relevance of past performance information.

(§15.608, FAC 90-26)

☞ Generally speaking, agency officials have broad discretion when determining the sources and types of past performance information to evaluate — which should be tailored to the circumstances of the acquisition. (§15.608, FAC 90-26)

☞ When you plan to evaluate past performance, the solicitation shall afford an offeror the opportunity to identify existing or past contracts awarded to the offeror that are similar in nature to the proposed terms and conditions of the solicitation. Contracting officers also may invite the offerors to provide information on problems encountered during performance of existing or past contracts and on the steps being taken by the offerors to correct the problems. (§15.608, FAC 90-26)

☞ Contracting officers may obtain information on the past performance of an offeror from sources other than the offeror. This includes any source (public or private sector) known to the Government. In particular, obtain information from contracting activities anywhere in the Government which have evaluated an offeror's performance as prescribed in FAR Part 42.15. (§15.608, FAC 90-26)

☞ Assign a neutral evaluation for past performance to any offeror which lacks relevant past performance history. (§15.608, FAC 90-26)

15.608 Proposal evaluation.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) Proposal evaluation is an assessment of both the proposal and the offeror's ability (as conveyed by the proposal) to successfully accomplish the prospective contract. An agency shall evaluate competitive proposals solely on the factors specified in the solicitation.	(a) Proposal evaluation is an assessment of both the proposal and the offeror's ability to successfully accomplish the prospective contract. An agency shall evaluate competitive proposals solely on the factors specified in the solicitation. [FAC 90-26]
(1) <i>Cost or price evaluation.</i> The contracting officer shall use cost or price analysis (see Subpart 15.8) to evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the contract. The contracting officer shall document the cost or price evaluation.	(1) <i>Cost or price evaluation.</i> The contracting officer shall use cost or price analysis (see Subpart 15.8) to evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the contract. The contracting officer shall document the cost or price evaluation.
(2) <i>Technical evaluation.</i> * * * *	(2) <i>Past Performance evaluation.</i> (i) Past performance information is an indicator of an offeror's ability to perform the contract. The comparative assessment of past performance information is

separate from the responsibility determination required under 9.103. The number and severity of an offeror's problems, the effectiveness of corrective actions taken, the offeror's overall work record, and the age and relevance of past performance information should be considered at the time it is used.

(ii) Where past performance is to be evaluated, the solicitation shall afford offerors the opportunity to identify Federal, state and local government, and private contracts performed by the offerors that were similar in nature to the contract being evaluated, so that the Government may verify the offerors' past performance on these contracts. In addition, at the discretion of the contracting officer, the offerors may provide information on problems encountered on the identified contracts and the offerors' corrective actions. Past performance information may also be obtained from other sources known to the Government. The source and type of past performance information to be included in the evaluation is within the broad discretion of agency acquisition officials and should be tailored to the circumstances of each acquisition. Evaluations of contractor performance prepared in accordance with Subpart 42.15 are one source of performance information which may be used.

(iii) Firms lacking relevant past performance history shall receive a neutral evaluation for past performance. [90-26]

(3) *Technical evaluation.* * * * *

☞ If the RFP included FAR 215-16 **absent** Alternate II, establish a competitive range and conduct discussions with all offerors in the competitive range.


If Alternate II was incorporated, determine whether discussions are necessary. If necessary, document the reasons in the contract file. The new FAR language provides no examples of circumstances under which discussions might be necessary. Among the potential reasons for conducting discussions:

- No proposal is technically acceptable.
- Only one proposal is technically acceptable, because other offerors appear to have misinterpreted the RFP's requirements.

- All prices appear to be unreasonably high, compared with prior prices or current market prices for like deliverables.
 - The lowest offered price appears to be unrealistic (e.g., the product of a potential cost estimating mistake) when compared with the Government estimate.
 - All prices are unrealistically low.
- (FAC 90-31, Case 94-701)

15.610 Written or oral discussion.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) The requirement in paragraph (b) of this section for written or oral discussion need not be applied in acquisitions—</p> <p>(1) In which prices are fixed by law or regulation;</p> <p>(2) Of the set-aside portion of a partial set-aside;</p> <p>(3) For civilian agencies other than the Coast Guard and the National Aeronautics and Space Administration, in which it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in the lowest overall cost to the Government at a fair and reasonable price; provided, that—</p> <p>—(i) The solicitation notified all offerors of the possibility that award might be made without discussion; and</p> <p>—(ii) The award is in fact made without any written or oral discussion with any offeror; or</p> <p>—(4) For the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, if the contracting officer determines that discussions are not necessary, provided the solicitation contains the provision at 52.215-16 with its Alternate III. Once the Government states its intent to award without discussions, the rationale for reversal of this decision shall be documented in the contract file.</p> <p>(b) Except as provided in paragraph (a) above, the contracting officer shall conduct written or oral discussion with all responsible offerors who submit proposals within the competitive range. The content and extent of the discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition (but see paragraphs (c) and (d) below).</p>	<p>(a) The requirement in paragraph (b) of this section for written or oral discussion need not be applied in acquisitions—</p> <p>(1) In which prices are fixed by law or regulation;</p> <p>(2) Of the set-aside portion of a partial set-aside;</p> <p>(3) In which the solicitation notified all offerors that the Government intends to evaluate proposals and make award without discussion unless the contracting officer determines that discussions (other than communications conducted for the purpose of minor clarification) are considered necessary (see 15.407(d)(4)). Once the Government states its intent to award without discussions, the rationale for reversal of this decision shall be documented in the contract file.</p> <p>(b) Except as provided in paragraph (a) of this section, the contracting officer shall conduct written or oral discussion with all responsible offerors who submit proposals within the competitive range. The content and extent of the discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition (but see paragraphs (c) and (d) of this section).</p>

 During discussions, provide an offeror the opportunity to discuss past performance information not previously made available to the offeror for review and comment. This

does NOT apply to information on past performance collected under FAR 42.15 — unless the contracting activity had failed to provide contractors with opportunities to review and comment on the past performance records as required by that FAR section.

During discussions, DO NOT disclose the names (or other identifiers) of individuals which provided reference information on the offeror's past performance. (§15.610, FAC 90-26)

15.610 Written or oral discussion.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>***</p> <p>(c) The contracting officer shall—</p> <p>(1) Control all discussions;</p> <p>(2) Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements;</p> <p>(3) Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal;</p> <p>(4) Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerors' proposals or the evaluation process (see 15.607 and Part 24); and</p> <p>(5) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the discussions.</p>	<p>***</p> <p>(c) The contracting officer shall—</p> <p>(1) Control all discussions;</p> <p>(2) Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements;</p> <p>(3) Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal;</p> <p>(4) Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerors' proposals or the evaluation process (see 15.607 and Part 24);</p> <p>(5) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the discussions; and</p> <p>(6) Provide the offeror an opportunity to discuss past performance information obtained from references on which the offeror had not had a previous opportunity to comment. Names of individuals providing reference information about an offeror's past performance shall not be disclosed. [FAC 90-26]</p>

☞ When reviewing proposed indirect costs, ask the cognizant audit office to determine whether any audits completed during the preceding 12 months addressed those costs. Do not request a new audit of the proposed indirect costs if information from the prior audits is adequate for determining the reasonableness of those costs. [§15.805-5, FAC 90-31, Case 94-740]

15.805-5 Field pricing support.


<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a)(1) When cost or pricing data are required,	(a)(1) When cost or pricing data are required,


contracting officers shall request a field pricing report (which may include an audit review by the cognizant contract audit activity) before negotiating any contract or modification resulting from a proposal in excess of \$500,000, except as otherwise authorized under agency procedures, unless information available to the contracting officer is considered adequate to determine the reasonableness of the proposed cost or price. Requests for field pricing support should be tailored to ask for minimum essential information needed to ensure a fair and reasonable price. Information of the type described in subdivisions (a)(1)(i) through (a)(1)(vi) of this subsection, which is often available to the contracting officer from the Administrative Contracting Officer or from the cognizant auditor, may be useful in determining the extent of any field pricing support that is needed—

* * * *

contracting officers shall request a field pricing report (which may include an audit review by the cognizant contract audit activity) before negotiating any contract or modification resulting from a proposal in excess of \$500,000, except as otherwise authorized under agency procedures, unless information available to the contracting officer is considered adequate to determine the reasonableness of the proposed cost or price. **The contracting officer should contact the cognizant audit office to determine the existence of audits addressing proposed indirect costs. In accordance with 41 U.S.C. 254d and 10 U.S.C. 2313, the contracting officer shall not request a preaward audit of such indirect costs unless the information available from any existing audit completed within the preceding 12 months is considered inadequate for determining the reasonableness of the proposed indirect costs.** Requests for field pricing support should be tailored to ask for minimum essential information needed to ensure a fair and reasonable price. Information of the type described in subdivisions (a)(1)(i) through (a)(1)(vi) of this subsection, which is often available to the contracting officer from the Administrative Contracting Officer or from the cognizant auditor, may be useful in determining the extent of any field pricing support that is needed—

* * * *

 Notify unsuccessful offerors within three days after award. (FAC 90-31, Case 94-701)
Consider notification by registered mail, with return receipt requested, or E-Mail with automatic return receipt, or fax if your fax software or hardware verifies receipt by the receiving fax station. For the purpose of this section, “day” means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday. (FAC 90-31, Case 94-701)

 Contracting officers can use electronic rather than paper medium to transmit preaward notices, postaward notices, and notices of award. (FAC 90-31, Case 94-701)

SUBPART 15.10—PREAWARD, AWARD, AND POSTAWARD NOTIFICATIONS, PROTESTS, AND MISTAKES

15.1001 General. This subpart applies to the use of competitive proposals, as described in 6.102(b), and a combination of competitive procedures, as described in 6.102(c). To the extent practicable, however, the procedures and intent of this subpart, with reasonable modification, should be followed for acquisitions described in 6.102(d): broad agency announcements, small business innovation research contracts and architect-engineer contracts. However, they do not apply to multiple award schedules, as described in 6.102(d)(3).

15.1002 Notifications to unsuccessful offerors.

(a) *General.* The contracting officer shall promptly notify each offeror whose proposal is determined to be unacceptable or whose offer is not selected for award, ~~unless disclosure might prejudice the Government's interest.~~

(a) *General.* **Within three days after the date of contract award**, the contracting officer shall notify, **in writing or electronically**, each offeror whose proposal is determined to be unacceptable or whose offer is not selected for award. **"Day", for purposes of the notification process, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday.**

(b) *Preaward notices.* (1) When the proposal evaluation period for a solicitation **not using simplified acquisition procedures in Part 13** is expected to exceed 30 days, or when a limited number of offerors have been selected as being within the competitive range (see 15.609), the contracting officer, upon determining that a proposal is unacceptable, shall promptly notify the offeror. The notice shall at least state (i) in general terms the basis for the determination and (ii) that a revision of the proposal will not be considered. [FAC 90- 29]

(2) In a small business set-aside (see Subpart 19.5), upon completion of negotiations and determinations of responsibility, but prior to award, the contracting officer shall inform each unsuccessful offeror in writing of the name and location of the apparent successful offeror. The notice shall also state that (i) the Government will not consider subsequent revisions of the unsuccessful proposal and (ii) no response is required unless a basis exists to challenge the small business size status of the apparently successful offeror. The

(b) *Preaward notices.* (1) When the proposal evaluation period for a solicitation ~~estimated to exceed the small purchase limitation in part 13~~ is expected to exceed 30 days, or when a limited number of offerors have been selected as being within the competitive range (see 15.609), the contracting officer, upon determining that a proposal is unacceptable, shall promptly notify the offeror. The notice shall at least state (i) in general terms the basis for the determination and (ii) that a revision of the proposal will not be considered.

(2) In a small business set-aside (see Subpart 19.5), upon completion of negotiations and determinations of responsibility, but prior to award, the contracting officer shall notify each unsuccessful offeror in writing **or electronically** of the name and location of the apparent successful offeror. The notice shall also state that (i) the Government will not consider subsequent revisions of the unsuccessful proposal and (ii) no response is required unless a basis exists to challenge the small business size status of the apparently successful offeror. The

notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay.

(c) *Postaward notices.* (1) **After** award of contracts resulting from solicitations **not using simplified acquisition procedures**, the contracting officer shall notify unsuccessful offerors in **writing or electronically**, unless preaward notice was given under paragraph (b) of this section. The notice shall include—

- (i) The number of offerors solicited;
- (ii) The number of proposals received;
- (iii) The name and address of each offeror receiving an award;
- (iv) The items, quantities, and unit prices of each award (if the number of items or other factors makes listing unit prices impracticable, only the total contract price need be furnished); and
- (v) In general terms, the reason the offeror's proposal was not accepted, unless the price information in (iv) above readily reveals the reason. In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

(2) For acquisitions subject to the Trade Agreements Act or the North American Free Trade Agreement (NAFTA) Implementation Act (see 25.405(e)), the information in paragraph (c)(1) of this section shall be provided to unsuccessful offerors from designated or NAFTA countries promptly, but in no event later than seven working days after contract award.

(3) Upon request, the contracting officer shall furnish the information described in 15.1001(c)(1) (i) through (v) to unsuccessful offerors in solicitations **using simplified acquisition procedures** in Part 13.

notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay.

(c) *Postaward notices.* (1) ~~Promptly after~~ award of contracts resulting from solicitations ~~exceeding the small purchase limitation in Part 13~~, the contracting officer shall notify unsuccessful offerors in ~~writing~~, unless preaward notice was given under paragraph (b) of this section. The notice shall include—

- (i) The number of offerors solicited
- (ii) The number of proposals received;
- (iii) The name and address of each offeror receiving an award;
- (iv) The items, quantities, and unit prices of each award (if the number of items or other factors makes listing unit prices impracticable, only the total contract price need be furnished); and
- (v) In general terms, the reason the offeror's proposal was not accepted, unless the price information in (iv) above readily reveals the reason. In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

(2) For acquisitions subject to the Trade Agreements Act or the North American Free Trade Agreement (NAFTA) Implementation Act (see 25.405(e)), the information in paragraph (c)(1) of this section shall be provided to unsuccessful offerors from designated or NAFTA countries promptly, but in no event later than seven working days after contract award.

(3) Upon request, the contracting officer shall furnish the information described in 15.1001(c)(1)(i) through (v) to unsuccessful offerors in solicitations ~~not exceeding the small purchase limitation in Part 13~~.

15.1003 Notification to successful offerors.

FAR as of FAC 90-25

The contracting officer shall award a contract with reasonable promptness to the successful offeror (selected in accordance with 15.611(d)) by transmitting written of the award to that offeror (but see 15.608(b)). * * * * *

FAR as revised

The contracting officer shall award a contract with reasonable promptness to the successful offeror (selected in accordance with 15.611(d)) by transmitting written **or electronic notice** of the award to that offeror (but see 15.608(b)). * * * * *

Requests for Debriefings

☞ Offerors (including awardees — not just the unsuccessful) may request debriefings whenever award is on the basis of competitive proposals, whether or not the contracting officer conducted discussions and whether or not award was on price and price related factors alone. (§15.1004, FAC 90-31, Case 94-701)

Conducting Debriefings

☞ Debriefings can be by electronic or any other method acceptable to the contracting officer. (§15.1004, FAC 90-31, Case 94-701)

☞ Reaffirms that COs are responsible for chairing debriefings (unless the CO is unavailable, in which case the contracting officer may designate some other agency representative to serve as the chair with approval of an individual a level above the CO). Also reaffirms that “individuals actually responsible for the evaluations shall provide support”. (§15.1004, FAC 90-31, Case 94-701)

Debriefing Do's and Don'ts

☞ Previously, the FAR required only that the Government share its evaluation of the significant weaknesses or deficiencies in the offeror's proposal. In addition, the Government team must at minimum now provide information on:

- The overall evaluated cost and technical rating of the successful offeror and the debriefed offeror, if applicable (obviously this would not apply to debriefings of awardees).*
- The overall ranking of all offerors when any ranking was developed by the agency during the source selection.*
- A summary of the rationale for award.*
- For commercial end items delivered under the contract, the make and model of the awardee's deliverable.*
- Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

(* do not apply to A&E contracts)

☞ However, you still may NOT provide point by point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, you still may NOT reveal any information exempt from release under the Freedom of Information Act, including—

- Trade secrets.
- Privileged or confidential manufacturing processes and techniques.

- Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information. (§15.1004, FAC 90-31, Case 94-701)

☞ The Freedom of Information Act also protects the names of individuals providing reference information about an offeror's past performance. (§15.1004, FAC 90-26)

Summarizing the Debriefing for the Record

☞ You must prepare an “official” summary of the debriefing for the contract file. The FAR doesn’t detail the contents of this summary. It could take the form of a memorandum for the record. Include a copy of the script, if you have such. Also include a list of questions and how they were answered. (§15.1004, FAC 90-31, Case 94-701)

Availability of Information from Debriefings to Prospective Offerors

☞ If, within one year of the protested contract award, you issue a new solicitation or request for BAFOs, make the following information available to all prospective offerors:

- Information on the successful offeror’s proposal provided in any debriefings on the original award.
- Other nonproprietary information that would have been provided to the original offerors.

(§15.1004, FAC 90-31, Case 94-701)

15.1004 Debriefing of unsuccessful offerors

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) When a contract is awarded on the basis of other than price alone (see Subpart 15.6), unsuccessful offerors, upon their written request, shall be debriefed as soon as possible and furnished the basis for the selection decision and contract award.	(a) When a contract is awarded on the basis of competitive proposals , an offeror, upon its written request received by the agency within three days after the date the unsuccessful offeror receives notice of contract award , shall be debriefed and furnished the basis for the selection decision and contract award. When practicable, debriefing requests received more than three days after the offeror receives notice of contract award shall be accommodated. However, accommodating such untimely debriefing requests does not extend the time within which suspension of performance can be required, as this accommodation is not a "required debriefing" as described in FAR Part 33. To the maximum extent practicable, the debriefing should occur within five days after receipt of the written request. "Day", for purposes of the debriefing process, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal

holiday.

(b) **Debriefings of successful and unsuccessful offerors may be done orally, in writing, by electronic means, or any other method acceptable to the contracting officer.**

(c) **The contracting officer should chair any debriefing session held. Individuals actually responsible for the evaluations shall provide support. If the contracting officer is unavailable, another agency representative may be designated by the contracting officer on a case-by-case basis, with the approval of an individual a level above the contracting officer.**

(b) Debriefing information shall include the Government's evaluation of the significant weak or deficient factors in the proposal; ~~however, point-by-point comparisons with other offerors' proposals shall not be made. Debriefing shall not reveal the relative merits or technical standing of competitors or the evaluation scoring.~~ Moreover, debriefing shall not reveal any information ~~that is not releasable under the Freedom of Information Act; for example—~~

- (1) Trade secrets;
- (2) Privileged or confidential manufacturing processes and techniques; ~~and~~
- (3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and

(d) **At a minimum**, the debriefing information shall include—

(1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, **if applicable**;

(2) **The overall evaluated cost or price and technical rating, if applicable, of the successful offeror and debriefed offeror;**

(3) **The overall ranking of all offerors when any ranking was developed by the agency during the source selection;**

(4) **A summary of the rationale for award;**

(5) **For acquisitions of commercial end items, the make and model of the item to be delivered by the successful offeror; and**

(6) **Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.**

(e) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, debriefing shall not reveal any information exempt from release under the Freedom of Information Act including—

- (1) Trade secrets;
- (2) Privileged or confidential manufacturing processes and techniques;
- (3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; **and**

(4) **The names of individuals providing**

(c) The contracting officer shall include a summary of the debriefing in the contract file.

reference information about an offeror's past performance. [FAC 90-26]

(f) The contracting officer shall include an **official** summary of the debriefing in the contract file.

(g) If, within one year of contract award, a protest causes the agency to issue either a new solicitation or a new request for best and final offers on the protested contract award, the agency shall make available to all offerors—

(1) Information provided in any debriefings conducted on the original award about the successful offeror's proposal; and

(2) Other nonproprietary information that would have been provided to the original offerors.


52.215-16 Contract Award.

FAR as of FAC 90-25

* * * *

FAR as revised

(h) The Government may disclose the following information in post-award debriefings to other offerors: (1) the overall evaluated cost and technical rating of the successful offeror; (2) the overall ranking of all offerors, when any ranking was developed by the agency during source selection; (3) a summary of the rationale for award; and (4) for acquisitions of commercial end items, the make and model or commercial item description of the item to be delivered by the successful offeror.

 Reject electronic proposals unless the offeror used an electronic commerce method specifically stipulated or permitted by the solicitation. (§52.215-9; FAC 90-29, 91-104)

52.215-9 Submission of Offers. * * * * * (d) **Offers submitted by electronic commerce shall be considered only if the electronic commerce method was specifically stipulated or permitted by the solicitation.**

✎ If submitted by an electronic commerce method authorized by the solicitation, do not consider an offer to be late if the Government received the offer “not later than 5:00 p.m. one working day prior to the date specified for receipt of” bids or proposals. (§14.304-1, 52.214-7, 52.214-23, 52.214-32, 52.214-33, 52.215-10, and 52.215-36; FAC 90-29, 91-104)

52.215-10 Late Submissions, Modifications, and Withdrawals of Proposals.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it—	(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it— * * * *
	(4) Was transmitted through an electronic commerce method authorized by the solicitation and was received by the Government not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or * * * *

52.215-36 Late Submissions, Modifications, and Withdrawals of Proposals (Overseas).

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it— (1) Was sent by mail or, if authorized by the solicitation, was sent by telegram or via facsimile, and it is determined by the Government the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or (2) Is the only proposal received.	(a) Any proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it— (1) Was sent by mail or, if authorized by the solicitation, was sent by telegram or via facsimile, and it is determined by the Government the late receipt was due solely to mishandling by the Government after receipt at the Government installation; (2) Was transmitted through an electronic commerce method authorized by the solicitation and was received by the Government not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or [FAC 90-29] (3) Is the only proposal received.

PART 16

TYPES OF CONTRACTS

☞ D&Fs are no longer required for cost reimbursable contracts or fixed price incentive contracts. Sections 1021 and 1071 of the Streamlining Act repealed the requirement for Secretarial/Agency Head determinations regarding use of cost type or incentive contracts. Therefore, the FAR at 16.301-3, 16.403, 16.403-1, and 16.403-2 has been amended to delete the requirement. (FAC 90-24)

☞ The FAR now permits contracting officers to sign the determinations and findings that are still required to establish the basis for application of the statutory price or fee limitation in cost-plus-fixed-fee contracts. Previously, the FAR delegated this authority to the “agency head or designee.” (§16.306, FAC 90-30, 94-700)

16.306 Cost-plus-fixed-fee contracts.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
* * * * *	* * * * *
(c) <i>Limitations.</i> No cost-plus-fixed-fee contract shall be awarded unless— (1) All limitations in 16.301-3 are complied with; and (2) The agency head or designee has signed a determination and findings establishing the basis for application of the statutory price or fee limitation (see 15.903(d)).	(c) <i>Limitations.</i> No cost-plus-fixed-fee contract shall be awarded unless— (1) All limitations in 16.301-3 are complied with; and (2) The contracting officer has signed a determination and findings establishing the basis for application of the statutory price or fee limitation (see 15.903(d)).

☞ Orders against indefinite contracts may be placed electronically, using electronic commerce methods. (§16.506, FAC 90-29, 91-104)

16.506 Ordering.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
* * * * *	* * * * *
(c) Orders may be placed by written telecommunication, if provided for in the contract Schedule.	(c) Orders may be placed by electronic commerce methods when permitted under the contract.

PART 17

SPECIAL CONTRACTING METHODS

☞ Options may be used as an evaluation factor only if the contracting officer determines that there is a reasonable likelihood that the options will be exercised. When soliciting sealed bids, put this determination in writing.

17.202 Use of options. (FAC 90-31, 94-701)

(a) Subject to the limitations of paragraphs (b) and (c) below, the contracting officer may include options in contracts when it is in the Government's interest. (See 17.207(f) with regard to the exercise of options.)

(b) Inclusion of an option is normally not in the Government's interest when, in the judgment of the contracting officer—

(1) The foreseeable requirements involve—

(i) Minimum economic quantities (i.e., quantities large enough to permit the recovery of startup costs and the production of the required supplies at a reasonable price); and

(ii) Delivery requirements far enough into the future to permit competitive acquisition, production, and delivery; or

(2) An indefinite quantity or requirements contract would be more appropriate than a contract with options. However, this does not preclude the use of an indefinite quantity contract or requirements contract with options.

(a) Subject to the limitations of paragraphs (b) and (c) of this section, **for both sealed bidding and contracting by negotiation**, the contracting officer may include options in contracts when it is in the Government's interest. **When using sealed bidding, the contracting officer shall make a written determination that there is a reasonable likelihood that the options will be exercised before including the provision at 52.217-5, Evaluation of Options, in the solicitation.** (See 17.207(f) with regard to the exercise of options.)

(b) Inclusion of an option is normally not in the Government's interest when, in the judgment of the contracting officer—

(1) The foreseeable requirements involve—

(i) Minimum economic quantities (i.e., quantities large enough to permit the recovery of startup costs and the production of the required supplies at a reasonable price); and

(ii) Delivery requirements far enough into the future to permit competitive acquisition, production, and delivery.

(2) An indefinite quantity or requirements contract would be more appropriate than a contract with options. However, this does not preclude the use of an indefinite quantity contract or requirements contract with options.

17.208 Solicitation provisions and contract clauses. (FAC 90-31, 94-701)

(a) The contracting officer shall insert a provision substantially the same as the provision at 52.217-3, Evaluation Exclusive of Options, in

(a) The contracting officer shall insert a provision substantially the same as the provision at 52.217-3, Evaluation Exclusive of Options, in

solicitations when the solicitation includes an option clause and does not include one of the provisions prescribed in paragraph (b) or (c) below.

(b) The contracting officer shall insert a provision substantially the same as the provision at 52.217-4, Evaluation of Options Exercised at Time of Contract Award, in solicitations when the solicitation includes an option clause, a determination has been made that there is a reasonable likelihood that the option will be exercised, and the option may be exercised at the time of contract award.

(c) The contracting officer shall insert a provision substantially the same as the provision at 52.217-5, Evaluation of Options, in solicitations when—

- (1) The solicitation contains an option clause;
- (2) An option is not to be exercised at the time of contract award;
- (3) A firm-fixed-price contract, a fixed-price contract with economic price adjustment, or other type of contract approved under agency procedures is contemplated; and
- (4) A determination has been made that there is a reasonable likelihood that the option will be exercised.

solicitations when the solicitation includes an option clause and does not include one of the provisions prescribed in paragraph (b) or (c) below.

(b) The contracting officer shall insert a provision substantially the same as the provision at 52.217-4, Evaluation of Options Exercised at Time of Contract Award, in solicitations when the solicitation includes an option clause, **the contracting officer has determined that there is a reasonable likelihood that the option will be exercised**, and the option may be exercised at the time of contract award

(c) The contracting officer shall insert a provision substantially the same as the provision at 52.217-5, Evaluation of Options, in solicitations when—

- (1) The solicitation contains an option clause;
- (2) An option is not to be exercised at the time of contract award;
- (3) A firm-fixed-price contract, a fixed-price contract with economic price adjustment, or other type of contract approved under agency procedures is contemplated; and
- (4) **The contracting officer has determined that there is a reasonable likelihood that the option will be exercised. For sealed bids, the determination shall be in writing.**

PART 25

FOREIGN ACQUISITION

☞ Notify unsuccessful offerors within three days after award. Consider notification by registered mail, with return receipt requested, or E-Mail with automatic return receipt, or fax if your fax software or hardware verifies receipt by the receiving fax station. (FAC 90-31, Case 94-701)

25.405 Procedures.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>When the Trade Agreements Act or North American Free Trade Agreement (NAFTA) applies, the following procedures shall be used:</p> <p>* * * *</p> <p>(e) Within 7 working days after a contract award for an eligible product, agencies shall give unsuccessful offerors from designated or NAFTA countries written notice in accordance with 14.408-1(a)(2) and 15.1001(c)(2).</p>	<p>When the Trade Agreements Act or North American Free Trade Agreement (NAFTA) applies, the following procedures shall be used:</p> <p>* * * *</p> <p>(e) Within three days after a contract award for an eligible product, agencies shall give unsuccessful offerors from designated or NAFTA countries notice in accordance with 14.409-1 and 15.1002. "Day," for purposes of the notification process, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday.</p>

☞ The Comptroller General's right of access to contractor records is established by the clauses at 52.214-26 and 52.215-2 — the clause at 52.215-1 is reserved. The clause at 52.215-2 also stresses that this right of access "may not be construed to require the Contractor or subcontractor to create or maintain any record that the Contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law". (§4.702, 15.106-1, 25.901, 52.214-26, and 52.215-2, FAC 90-31, Case 94-740)

☞ A new Alternate III to the clause at FAR 52.215-2 waives the Comptroller General's right to examine the records of foreign contractors. Do not automatically waive that right. Rather, the FAR requires every reasonable effort to negotiate incorporation of the "basic" clause at FAR 52.215-2 with the Comptroller's right of access intact — and the FAR maintains essentially the same controls on waivers that formerly applied to decisions about omitting the clause at 52.215-1. (§25.901 and 52.215-2; FAC 90-31, Case 94-740).

25.000 Scope of part.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
Except as provided in agency regulations, this part provides policies and procedures to implement the Buy American Act, the Balance of Payments Program, purchases under the Trade Agreements Act of 1979, and other laws and regulations that pertain to acquiring foreign supplies, services, and construction materials. This part also provides policies and procedures for the application to foreign acquisitions of international agreements, customs and duties, the clause at 52.215-1, Examination of Records by Comptroller General, and use of local currency for payment.	Except as provided in agency regulations, this part provides policies and procedures to implement the Buy American Act, the Balance of Payments Program, purchases under the Trade Agreements Act of 1979, and other laws and regulations that pertain to acquiring foreign supplies, services, and construction materials. This part also provides policies and procedures pertaining to international agreements, customs and duties, the clause at 52.215-2, Audit and Records—Negotiation, and use of local currency for payment.

25.901 Omission of audit clause

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) <i>Definition.</i> “Foreign contractor,” as used in this subpart, means a contractor or subcontractor organized or existing under the laws of a country other than the United States, its territories, or possessions.</p> <p>(b) <i>Policy.</i> As required by 10 U.S.C. 2313, 41 U.S.C. 254, and 15.106-1(b)(3), the contracting officer shall consider for use in negotiated contracts with foreign contractors, whenever possible, the clause at 52.215-1, Examination of Records by Comptroller General. Omission of the clause should be approved only after the contracting agency, having considered such factors as alternate sources of supply, additional cost, and time of delivery, has made all reasonable efforts to include the clause.</p> <p>(c) <i>Conditions for omission.</i> (1) The contracting officer may omit the clause at 52.215-1, Examination of Records by Comptroller General, from contracts with foreign contractors—</p> <p>(i) If the agency head determines, with the concurrence of the Comptroller General or a designee, the omission of the clause will serve the public interest; or</p> <p>(ii) If the contractor is a foreign government or agency thereof or is precluded by the laws of the country involved from</p>	<p>(a) <i>Definition.</i> “Foreign contractor,” as used in this subpart, means a contractor or subcontractor organized or existing under the laws of a country other than the United States, its territories, or possessions.</p> <p>(b) <i>Policy.</i> As required by 10 U.S.C. 2313, 41 U.S.C. 254d, and 15.106-1(b), the contracting officer shall consider for use in negotiated contracts with foreign contractors, whenever possible, the basic clause at 52.215-2, Audit and Records—Negotiation, which authorizes examination of records by the Comptroller General. Use of the clause with Alternate III should be approved only after the contracting agency, having considered such factors as alternate sources of supply, additional cost, and time of delivery, has made all reasonable efforts to include the basic clause.</p> <p>(c) <i>Conditions for use of Alternate III.</i> The contracting officer may use the clause at 52.215-2, Audit and Records—Negotiation, with its Alternate III in contracts with foreign contractors—</p> <p>(1) If the agency head, or designee, determines, with the concurrence of the Comptroller General, that waiver of the right to examination of records by the Comptroller General will serve the public interest; or</p> <p>(2) If the contractor is a foreign government or</p>

making its ~~books, documents, papers, or~~ records available for examination, and the agency head determines, after taking into account the price and availability of the property or services from domestic sources, that omission of the clause best serves the public interest.

~~(2) When a determination under subparagraph (e)(1)(ii) of this section is the basis for omission of the clause at 52.215-1, Examination of Records by Comptroller General, the agency head shall forward a written report to the Congress explaining the reasons for the determination; except that this requirement is not applicable to the Department of Defense.~~

(d) *Determination and findings.* The determination and findings shall—

- (1) Identify the contract and its purpose, and whether it is a contract with a foreign contractor or with a foreign government or agency thereof;
- (2) Describe the efforts to include the clause;
- (3) State the reasons for the contractor's refusal to include the clause;
- (4) Describe the price and availability of the property or services from the United States and other sources; and
- (5) Determine that it will serve the interest of the United States to ~~omit the clause~~.

agency thereof or is precluded by the laws of the country involved from making its **records, as defined at 4.703(a)**, available for examination, and the agency head, or designee, determines, after taking into account the price and availability of the property or services from United States sources, that waiver of the right to examination of records by the Comptroller General best serves the public interest.

(d) *Determination and findings.* The determination and findings shall—

- (1) Identify the contract and its purpose, and whether it is a contract with a foreign contractor or with a foreign government or agency thereof;
- (2) Describe the efforts to include the **basic** clause;
- (3) State the reasons for the contractor's refusal to include the **basic** clause;
- (4) Describe the price and availability of the property or services from the United States and other sources; and
- (5) Determine that it will serve the interest of the United States to **use the clause with its Alternate III**.

PART 31

CONTRACT COST PRINCIPLES AND PROCEDURES

☞ The following section has been added to reference FAR Part 42 sections related to certification requirements for indirect cost proposals and penalties for including unallowable costs in final indirect cost settlement proposals. [§31.110, FAC 90-31, Case 94-751]

31.110 Indirect cost rate certification and penalties on unallowable costs.

(a) Certain contracts require certification of the indirect cost rates proposed for progress, billing, or final payment purposes. See 42.703-2 for administrative procedures regarding the certification provisions and the related contract clause prescription.

(b) If unallowable costs are included in final indirect cost settlement proposals, penalties may be assessed. See 42.709 for administrative procedures regarding the penalty assessment provisions and the related contract clause prescription.

☞ The costs of sponsoring conventions are unallowable when “the principal purpose of the event is other than dissemination of technical information or stimulation of production.” [§31.205-1 and 205-43, FAC 90-31, Case 94-754]

31.205-1 Public relations and advertising costs.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
* * * *	* * * *
(f) Unallowable public relations and advertising costs include the following:	(f) Unallowable public relations and advertising costs include the following:
* * * *	* * * *
(3) Costs of sponsoring meetings, symposia, seminars, and other special events when the principal purpose of the event is other than dissemination of technical information or stimulation of production.	(3) Costs of sponsoring meetings, conventions , symposia, seminars, and other special events when the principal purpose of the event is other than dissemination of technical information or stimulation of production.
* * * *	* * * *

31.205-43 Trade, business, technical and professional activity costs.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
The following types of costs are allowable:	The following types of costs are allowable:

(a) Memberships in trade, business, technical, and professional organizations.

(b) Subscriptions to trade, business, professional, or other technical periodicals.

(c) When the principal purpose of a meeting, conference, symposium, or seminar is the dissemination of trade, business, technical or professional information or the stimulation of production or improved productivity—

(1) Costs of organizing, setting up, and sponsoring the meetings, symposia, etc., including rental of meeting facilities, transportation, subsistence, and incidental costs;

(2) Costs of attendance by contractor employees, including travel costs (see 31.205-46); and

(3) Costs of attendance by individuals who are not employees of the contractor, *provided* (i) such costs are not also reimbursed to the individual by the employing company or organization, and (ii) the individuals attendance is essential to achieve the purpose of the conference, meeting, symposium, etc.

(a) Memberships in trade, business, technical, and professional organizations.

(b) Subscriptions to trade, business, professional, or other technical periodicals.

(c) When the principal purpose of a meeting, **convention**, conference, symposium, or seminar is the dissemination of trade, business, technical or professional information or the stimulation of production or improved productivity—

(1) Costs of organizing, setting up, and sponsoring the meetings, **conventions**, symposia, etc., including rental of meeting facilities, transportation, subsistence, and incidental costs;

(2) Costs of attendance by contractor employees, including travel costs (see 31.205-46); and

(3) Costs of attendance by individuals who are not employees of the contractor, *provided* (i) such costs are not also reimbursed to the individual by the employing company or organization, and (ii) the individuals attendance is essential to achieve the purpose of the conference, meeting, **convention**, symposium, etc.

✎ The FAR imposes additional restrictions on the allowability of severance costs for foreign nationals employed outside the United States. Under certain conditions, for instance, all severance costs are unallowable if the termination of employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States facility in that country at the request of the government of that country.

However, FAR §37.113 allows waivers of the restrictions. [§31.205-6, 37.113, 52.237-8, and 52.237-9; FAC 90-31, Case 94-754]

31.205-6 Compensation for personal services.

FAR as of FAC 90-25

* * * *

(g) *Severance pay*. (1) Severance pay, also commonly referred to as dismissal wages, is a payment in addition to regular salaries and wages by contractors to workers whose employment is being involuntarily terminated. Payments for early retirement incentive plans are covered in subparagraph (j)(6) below.

(2) Severance pay to be allowable must meet the general allowability criteria in subdivision (g)(2)(i) below, and, depending upon whether the severance is normal or abnormal, criteria in

FAR as revised

* * * *

(g) *Severance pay*. (1) Severance pay, also commonly referred to as dismissal wages, is a payment in addition to regular salaries and wages by contractors to workers whose employment is being involuntarily terminated. Payments for early retirement incentive plans are covered in subparagraph (j)(6) below.

(2) Severance pay to be allowable must meet the general allowability criteria in subdivision (g)(2)(i) below, and, depending upon whether the severance is normal or abnormal, criteria in subdivision (g)(2)(ii)


subdivision (g)(2)(ii) for normal severance pay or subdivision (g)(2)(iii) for abnormal severance pay also apply.

* * * *

for normal severance pay or subdivision (g)(2)(iii) for abnormal severance pay also apply. **In addition, paragraph (g)(3) of this subsection applies if the severance cost is for foreign nationals employed outside the United States.**

* * * *

(3) Notwithstanding the reference to geographical area in 31.205-6(b)(1), under 10 U.S.C. 2324(e)(1)(M) and 41 U.S.C. 256(e)(1)(M), the costs of severance payments to foreign nationals employed under a service contract performed outside the United States are unallowable to the extent that such payments exceed amounts typically paid to employees providing similar services in the same industry in the United States. Further, under 10 U.S.C. 2324(e)(1)(N) and 41 U.S.C. 256(e)(1)(N), all such costs of severance payments which are otherwise allowable are unallowable if the termination of employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States facility in that country at the request of the government of that country; this does not apply if the closing of a facility or curtailment of activities is made pursuant to a status-of-forces or other country-to-country agreement entered into with the government of that country before November 29, 1989. 10 U.S.C. 2324(e)(3) and 41 U.S.C. 256(e)(2) permit the head of the agency, or designee, to waive these cost allowability limitations under certain circumstances (see 37.113 and the solicitation provision at 52.237-8).

 The costs of recreation are expressly unallowable with the exception of costs of company sponsored employee sports teams and employee organizations designed to improve company loyalty, team work, or physical fitness. The final rule retains the allowability of "wellness/fitness centers" found in the interim rule. The final rule eliminates the requirement that costs are only allowable to the extent that the net amount per employee must be reasonable for all categories of costs under this cost principle. [§31.205-13, FAC 90-31, Case 94-750]

✎ The costs of gifts are expressly unallowable (31.205-13(b)). However, this does not apply to costs which meet the definition of, and are properly accounted for as, compensation or recognition awards under §31.205-6. [§31.205-13, FAC 90-31, Case 94-750]

31.205-13 Employee morale, health, welfare, food service, and dormitory costs and credits.

(a) ~~This paragraph (a) applies to costs incurred before the effective date of implementation in FAR of sections 2101 and 2151 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355).~~

~~—— (1) Aggregate costs incurred on activities designed to improve working conditions, employer-employee relations, employee morale, and employee performance (less income generated by these activities) are allowable, except as limited by paragraph (a)(2) of this section, and to the extent that the net amount is reasonable. Some examples are house publications, health clinics, recreation, employee counseling services, and food and dormitory services, which include operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations, or similar types of services for the contractor's employees at or near the contractor's facilities.~~

~~—— (2) Losses from operating food and dormitory services may be included as costs only if the contractor's objective is to operate such services on a break-even basis. Losses sustained because food services or lodging accommodations are furnished without charge or at prices or rates which obviously would not be conducive to the accomplishment of the above objective are not allowable. A loss may be allowed, however, to the extent that the contractor can demonstrate that unusual circumstances exist (e.g., (i) where the contractor must provide food or dormitory services at remote locations where adequate commercial facilities are not reasonably available, or (ii) where charged but unproductive labor costs would be excessive but for the services provided or where cessation or reduction of food or dormitory operations will not otherwise yield net cost savings) such that even with efficient management, operating the services on a break-even basis would require charging inordinately high prices, or prices or rates higher than those charged by commercial establishments offering the same services in the same geographical areas. Costs of food and dormitory services shall include an allocable share of indirect expenses pertaining to these activities.~~

~~—— (3) When the contractor has an arrangement authorizing an employee association to provide or operate a service, such as vending machines in the contractor's plant and retain the profits, such profits shall be treated in the same manner as if the contractor were providing the service (but see paragraph (a)(4) of this section).~~

~~—— (4) Contributions by the contractor to an employee organization, including funds from vending machine receipts or similar sources, may be included as costs incurred under paragraph (a)(1) of this section only to the extent that the contractor demonstrates that an equivalent amount of the costs incurred by the employee organization would be allowable if directly incurred by the contractor.~~

(b) ~~This paragraph (b) implements section 2192 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355). It applies to costs incurred after the effective date of implementation in FAR of sections 2101 and 2151 of Pub. L. 103-355.~~

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(1) Aggregate costs incurred on activities designed to improve working conditions, employer-employee relations, employee morale, and employee performance (less income generated by these activities) are allowable, except as limited by paragraphs (b)(2), (3), and (4) of this section, and to the extent that the net amount per employee is	(a) Aggregate costs incurred on activities designed to improve working conditions, employer-employee relations, employee morale, and employee performance (less income generated by these activities) are allowable, except as limited by paragraphs (b), (c), and (d) of this subsection. Some examples of allowable activities are house

~~reasonable~~. Some examples of allowable activities are house publications, health clinics, wellness/fitness centers, employee counseling services, and food and dormitory services, which include operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations, or similar types of services for the contractor's employees at or near the contractor's facilities.

(2) Costs of gifts are unallowable.

(3) Costs of recreation are unallowable, except for the costs of contractor employees' participation in sports teams designed to improve company loyalty, team work, or employee physical fitness, ~~conducted during off duty hours at a nominal cost per participating employee.~~

(4) Losses from operating food and dormitory services may be included as costs only if the contractor's objective is to operate such services on a break-even basis. Losses sustained because food services or lodging accommodations are furnished without charge or at prices or rates which obviously would not be conducive to the accomplishment of the above objective are not allowable. A loss may be allowed, however, to the extent that the contractor can demonstrate that unusual circumstances exist (e.g., ~~(i)~~ where the contractor must provide food or dormitory services at remote locations where adequate commercial facilities are not reasonably available, or ~~(ii)~~ where charged but unproductive labor costs would be excessive but for the services provided or where cessation or reduction of food or dormitory operations will not otherwise yield net cost savings) such that even with efficient management, operating the services on a break-even basis would require charging inordinately high prices, or prices or rates higher than those charged by commercial establishments offering the same services in the same geographical areas. Costs of food and dormitory services shall include an allocable share of indirect expenses pertaining to these activities.

(5) When the contractor has an arrangement authorizing an employee association

publications, health clinics, wellness/fitness centers, employee counseling services, and food and dormitory services, which include operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations, or similar types of services for the contractor's employees at or near the contractor's facilities.

(b) Costs of gifts are unallowable. **(Gifts do not include awards for performance made pursuant to 31.205-6(f) or awards made in recognition of employee achievements pursuant to an established contractor plan or policy.)**

(c) Costs of recreation are unallowable, except for the costs of employees' participation in company sponsored sports teams or employee organizations designed to improve company loyalty, team work, or physical fitness.

(d) Losses from operating food and dormitory services may be included as costs only if the contractor's objective is to operate such services on a break-even basis. Losses sustained because food services or lodging accommodations are furnished without charge or at prices or rates which obviously would not be conducive to the accomplishment of the above objective are not allowable. A loss may be allowed, however, to the extent that the contractor can demonstrate that unusual circumstances exist (e.g., where the contractor must provide food or dormitory services at remote locations where adequate commercial facilities are not reasonably available; or where charged but unproductive labor costs would be excessive but for the services provided or where cessation or reduction of food or dormitory operations will not otherwise yield net cost savings) such that even with efficient management, operating the services on a break-even basis would require charging inordinately high prices, or prices or rates higher than those charged by commercial establishments offering the same services in the same geographical areas. Costs of food and dormitory services shall include an allocable share of indirect expenses pertaining to these activities.

(e) When the contractor has an arrangement authorizing an employee association to provide or

to provide or operate a service, such as vending machines in the contractor's plant and retain the profits, such profits shall be treated in the same manner as if the contractor were providing the service (but see paragraph (b)(6) of this section).

operate a service, such as vending machines in the contractor's plant, and retain the profits, such profits shall be treated in the same manner as if the contractor were providing the service (but see paragraph (f) of this subsection).

(6) Contributions by the contractor to an employee organization, including funds from vending machine receipts or similar sources, may be included as costs incurred under paragraph (b)(1) of this section only to the extent that the contractor demonstrates that an equivalent amount of the costs incurred by the employee organization would be allowable if directly incurred by the contractor.

(f) Contributions by the contractor to an employee organization, including funds from vending machine receipts or similar sources, may be included as costs incurred under paragraph (a) of this subsection only to the extent that the contractor demonstrates that an equivalent amount of the costs incurred by the employee organization would be allowable if directly incurred by the contractor.

✎ FAR 31.205-14, “Entertainment Costs”, incorporates the statutory wording of the Federal Acquisition Streamlining Act relating to the unallowability of entertainment costs under any other cost principle. This revision specifically disallows entertainment costs which some may have previously considered allowable. [§31.205-14, FAC 90-31, Case 94-750]

31.205-14 Entertainment costs

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) This paragraph (a) applies to costs incurred before the effective date of implementation in FAR of sections 2101 and 2151 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355). Costs of amusement, diversion, social activities, and any directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities are unallowable (but see 31.205-1 and 31.205-13). Costs of membership in social, dining, or country clubs or other organizations having the same purposes are also unallowable, regardless of whether the cost is reported as taxable income to the employees.</p>	
<p>(b) This paragraph (b) implements section 2192 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355). It applies to costs incurred after the effective date of implementation in FAR of sections 2101 and 2151 of Pub. L. 103-355. Costs of amusement, diversion, social activities, and any directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities are unallowable. Costs</p>	<p>Costs of amusement, diversions, social activities, and any directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities are unallowable. Costs made specifically unallowable under this cost principle are not allowable under any other cost principle. Costs of membership in social, dining, or country clubs or other organizations having the same purposes are also</p>

made specifically unallowable under this cost principle are not allowable under any other cost principle. Costs of membership in social, dining, or country clubs or other organizations having the same purposes are also unallowable, regardless of whether the cost is reported as taxable income to the employees.

unallowable, regardless of whether the cost is reported as taxable income to the employees.

☞ The costs of lobbying local Governments are unallowable, in the same respect that such costs are unallowable at the State and Federal levels. [§31.205-22, FAC 90-31, Case 94-754]

31.205-22 Legislative lobbying costs.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) Costs associated with the following activities are unallowable: * * * * *	(a) Costs associated with the following activities are unallowable: * * * * *
(3) Any attempt to influence (i) the introduction of Federal or state legislation, or (ii) the enactment or modification of any pending Federal or state legislation through communication with any member or employee of the Congress or state legislature (including efforts to influence state or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enrolled legislation;	(3) Any attempt to influence (i) the introduction of Federal, state, or local legislation, or (ii) the enactment or modification of any pending Federal, state, or local legislation through communication with any member or employee of the Congress or state legislature (including efforts to influence state or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enrolled legislation;
(4) Any attempt to influence (i) the introduction of Federal or state legislation, or (ii) the enactment or modification of any pending Federal or state legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fund raising drive, lobbying campaign or letter writing or telephone campaign; or * * * * *	(4) Any attempt to influence (i) the introduction of Federal, state, or local legislation, or (ii) the enactment or modification of any pending Federal, state, or local legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fund raising drive, lobbying campaign or letter writing or telephone campaign; or * * * * *

☞ Section 31.603 has been expanded to list 15 types of costs that are unallowable in statute. [§31.603 and 31.703, FAC 90-31, Case 94-754]

31.603 Requirements.

(a) Contracts that refer to this Subpart 31.6 for determining allowable costs under contracts with State, local and Indian tribal governments shall be deemed to refer to, and shall have the allowability of costs determined by the contracting officer in accordance with, the revision of OMB Circular A-87 which is in effect on the date of the contract.

(b) Agencies are not expected to place additional restrictions on individual items of cost.

(a) Contracts that refer to this Subpart 31.6 for determining allowable costs under contracts with State, local and Indian tribal governments shall be deemed to refer to, and shall have the allowability of costs determined by the contracting officer in accordance with, the revision of OMB Circular A-87 which is in effect on the date of the contract.

(b) Agencies are not expected to place additional restrictions on individual items of cost. **However, under 10 U.S.C. 2324(e) and 41 U.S.C. 256(e), the following costs are unallowable:**

(1) **Costs of entertainment, including amusement, diversion, and social activities, and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).**

(2) **Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.**

(3) **Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).**

(4) **Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, state, local, or foreign laws and regulations, except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance such payments in accordance with applicable regulations in the FAR or an executive agency supplement to the FAR.**

(5) **Costs of any membership in any social, dining, or country club or organization.**

(6) **Costs of alcoholic beverages.**

(7) **Contributions or donations, regardless of the recipient.**

(8) Costs of advertising designed to promote the contractor or its products.

(9) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(10) Costs for travel by commercial aircraft which exceed the amount of the standard commercial fare.

(11) Costs incurred in making any payment (commonly known as a "golden parachute payment") which is—

(i) In an amount in excess of the normal severance pay paid by the contractor to an employee upon termination of employment; and

(ii) Is paid to the employee contingent upon, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor's assets.

(12) Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor's own defects in materials or workmanship.

(13) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of the severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry providing similar services in the United States, as determined by regulations in the FAR or in an executive agency supplement to the FAR.

(14) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed in a foreign country if the termination of the employment of the foreign national is the result of the closing of, or curtailment of activities at, a United States facility in that country at the request of the government of that country.

(15) Costs incurred by a contractor in connection with any criminal, civil, or administrative proceedings commenced by the United States or a State, to the extent provided in 10 U.S.C. 2324(k) or 41 U.S.C. 256(k).

31.703 Requirements.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) Contracts which refer to this Subpart 31.7 for determining allowable costs shall be deemed to refer to, and shall have the allowability of costs determined by the contracting officer in accordance with, the revision of OMB Circular A-122 in effect on the date of the contract.</p> <p>(b) Agencies are not expected to place additional restrictions on individual items of cost.</p>	<p>(a) Contracts which refer to this Subpart 31.7 for determining allowable costs shall be deemed to refer to, and shall have the allowability of costs determined by the contracting officer in accordance with, the revision of OMB Circular A-122 in effect on the date of the contract.</p> <p>(b) Agencies are not expected to place additional restrictions on individual items of cost. However, under 10 U.S.C. 2324(e) and 41 U.S.C. 256(e), the costs cited in 31.603(b) are unallowable.</p>

PART 32

☞ Contracting officers may execute service contracts (or an order under a task order contract or an option) for a period of performance that begins in one fiscal year and ends in the following fiscal year — with the contract entirely funded out of the first year’s appropriations. This new authority will simplify the acquisition and administration of service contracts by allowing single, fully funded contract actions, in lieu of multiple contracts or complex obligation arrangements. However, the period of performance for the contract, order, or option so funded may not exceed twelve months.

Using this authority, for example, a contracting officer could write a contract for performance beginning on July 1, 1999 and ending on June 31, 2000 — and fund all work under the contract out of a fiscal year 1999 appropriation.

This new authority does not apply to the Department of Defense (DoD), United States Coast Guard, and the National Aeronautics and Space Administration (but see their FAR supplements for similar authorities). [§32.703-3 and 37.106, FAC 90-30, Case 94-766]

32.703-3 Contracts crossing fiscal years.

FAR as of FAC 90-25

A contract that is funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization (see 41 U.S.C. 11a, 31 U.S.C. 1308, and 42 U.S.C. 2459a), or when the contract calls for an end product that cannot feasibly be subdivided for separate performance in each fiscal year (e.g., contracts for expert or consultant services).

FAR as revised

(a) A contract that is funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization (see 41 U.S.C. 11a, 31 U.S.C. 1308, 42 U.S.C. 2459a and 41 U.S.C. 253I (see paragraph (b) of this section)), or when the contract calls for an end product that cannot feasibly be subdivided for separate performance in each fiscal year (e.g., contracts for expert or consultant services).

(b) **41 U.S.C. 253I, as amended by Section 1073 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355), authorizes heads of executive agencies other than the Department of Defense, United States Coast Guard, and the National Aeronautics and Space Administration (41 U.S.C. 252(a)(1)), to enter into a basic contract, options, or orders under that contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the basic contract, options or orders under that contract does not exceed one year each. Funds made available for a fiscal year may**

be obligated for the total amount of an action entered into under this authority (see 37.106(b)). Consult agency supplements for similar authorities that may exist for the Department of Defense, United States Coast Guard, or the National Aeronautics and Space Administration.

PART 36

CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

☞ Notify unsuccessful offerors within three days after award. Consider notification by registered mail, with return receipt requested, or E-Mail with automatic return receipt, or fax if your fax software or hardware verifies receipt by the receiving fax station. (FAC 90-31, Case 94-701)

36.306 Notice of award.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
When a notice of award is issued, it shall contain information required by 14.407 and shall— * * * *	When a notice of award is issued, it shall be done in writing or electronically , shall contain information required by 14.408 and shall— * * * *

☞ Previously, the FAR required only that the Government share its evaluation of the significant weaknesses or deficiencies in the offeror's proposal. In addition, the Government team must at minimum now provide information on:

- The overall evaluated cost and technical rating of the successful offeror and the debriefed offeror, if applicable (obviously this would not apply to debriefings of awardees).*
- The overall ranking of all offerors when any ranking was developed by the agency during the source selection.*
- A summary of the rationale for award.*
- For commercial end items delivered under the contract, the make and model or commercial item description of the awardee's deliverable.*
- Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

(* do not apply to A&E contracts)

Purpose -- to facilitate frank and open discussions leading hopefully better proposals on future procurements. In fact, the FAR never prohibited COs from providing the above information. The difference is that providing such information is now mandatory. COs will need to budget more time for debriefings. (§15.1004 and §36.607(b), FAC 90-31, Case 94-701)

36.607 Release of information on firm selection.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>After final selection has taken place, the contracting officer may release information identifying only the architect-engineer firm with which a contract will be negotiated for certain work. The work should be described in any release only in general terms, unless information relating to the work is classified. If negotiations are terminated without awarding a contract to the highest rated firm, the contracting officer may release that information and state that negotiations will be undertaken with another (named) architect-engineer firm. When an award has been made, the contracting officer may release award information (see 5.401).</p>	<p>(a) After final selection has taken place, the contracting officer may release information identifying only the architect-engineer firm with which a contract will be negotiated for certain work. The work should be described in any release only in general terms, unless information relating to the work is classified. If negotiations are terminated without awarding a contract to the highest rated firm, the contracting officer may release that information and state that negotiations will be undertaken with another (named) architect-engineer firm. When an award has been made, the contracting officer may release award information (see 5.401)</p> <p>(b) Debriefings of successful and unsuccessful firms will be held after final selection has taken place and will be conducted, to the extent practicable, in accordance with <u>15.1004(b) through (g)</u>. <u>Note that 15.1004(d)(2) through (d)(5) does not apply to architect-engineer contracts.</u></p>

SERVICE CONTRACTING

☞ Contracting officers may execute service contracts (or an order under a task order contract or an option) for a period of performance that begins in one fiscal year and ends in the following fiscal year — with the contract entirely funded out of the first year’s appropriations. This new authority will simplify the acquisition and administration of service contracts by allowing single, fully funded contract actions, in lieu of multiple contracts or complex obligation arrangements. However, the period of performance for the contract, order, or option so funded may not exceed twelve months.

Using this authority, for example, a contracting officer could write a contract for performance beginning on July 1, 1999 and ending on June 31, 2000 — and fund all work under the contract out of a fiscal year 1999 appropriation.

This new authority does not apply to the Department of Defense (DoD), United States Coast Guard, and the National Aeronautics and Space Administration (but see their FAR supplements for similar authorities). [§32.703-3 and 37.106, FAC 90-30, Case 94-766]

37.106 Funding and term of service contracts.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
When contracts for services are funded by annual appropriations, the term of contracts so funded shall not extend beyond the end of the fiscal year of the appropriation except when authorized by law (see 32.703-2 for contracts conditioned upon availability of funds and 32.703-3 for contracts crossing fiscal years).	(a) When contracts for services are funded by annual appropriations, the term of contracts so funded shall not extend beyond the end of the fiscal year of the appropriation except when authorized by law (see paragraph (b) of this section for certain service contracts , 32.703-2 for contracts conditioned upon availability of funds, and 32.703-3 for contracts crossing fiscal years).
	(b) 41 U.S.C. 253I, as amended by Section 1073 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355), authorizes the head of any executive agency except the Department of Defense, United States Coast Guard, and the National Aeronautics and Space Administration (41 U.S.C. 252(a)(1)), to enter into a basic contract, options, or orders under that contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the basic contract, options or orders under that contract does not exceed one year each.

Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority (see 32.703-3(b)). Consult agency supplements for similar authorities that may exist for the Department of Defense, United States Coast Guard, or the National Aeronautics and Space Administration.

✎ The FAR imposes additional restrictions on the allowability of severance costs for foreign nationals employed outside the United States. Under certain conditions, for instance, all severance costs are unallowable if the termination of employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States facility in that country at the request of the government of that country.

However, FAR §37.113 allows waivers of the restrictions. [§31.205-6, 37.113, 52.237-8, and 52.237-9; FAC 90-31, Case 94-754]

37.113 Severance payments to foreign nationals.

[Section added by FAC 90-31]

37.113 Severance payments to foreign nationals.

37.113-1 Waiver of cost allowability limitations.

(a) The head of any agency, or designee, may waive the 31.205-6(g)(3) cost allowability limitations on severance payments to foreign nationals for contracts that—

(1) Provide significant support services for (i) members of the armed forces stationed or deployed outside the United States, or (ii) employees of an executive agency posted outside the United States; and

(2) Will be performed in whole or in part outside the United States.

(b) Waivers can be granted only before contract award.

(c) Waivers cannot be granted for—

(1) Military banking contracts, which are covered by 10 U.S.C. 2324(e)(2); or

(2) Severance payments made by a contractor to a foreign national employed by the contractor under a DOD service contract in the Republic of the Philippines, if the discontinuation of the foreign national is the result of the termination of basing rights of the United States military in the Republic of the Philippines (section 1351(b) of Public Law 102-484, 10 U.S.C. 1592, note).

37.113-2 Solicitation provision and contract clause.

(a) Use the provision at 52.237-8, Restriction on Severance Payments to Foreign Nationals, in all solicitations that meet the criteria in 37.113-1(a), except for those excluded by 37.113-1(c).

(b) When the head of an agency, or designee, has granted a waiver pursuant to 37.113-1, use the clause at 52.237-9, Waiver of Limitation on Severance Payments to Foreign Nationals.

52.237-8 Restriction on Severance Payments to Foreign Nationals.

As prescribed in 37.113-2(a), use the following provision:

**RESTRICTION ON SEVERANCE PAYMENTS
TO FOREIGN NATIONALS (OCT 1995)**

(a) The Federal Acquisition Regulation (FAR), at 31.205-6(g)(3), limits the cost allowability of severance payments to foreign nationals employed under a service contract performed outside the United States unless the head of the agency, or designee, grants a waiver pursuant to FAR 37.113-1 before contract award.

(b) In making the determination concerning the granting of a waiver, the head of the agency, or designee, will determine that—

(1) The application of the severance pay limitations to the contract would adversely affect the continuation of a program, project, or activity that provides significant support services for (i) members of the armed forces stationed or deployed outside the United States, or (ii) employees of an executive agency posted outside the United States;

(2) The Contractor has taken (or has established plans to take) appropriate actions within its control to minimize the amount and number of incidents of the payment of severance pay to employees under the contract who are foreign nationals; and

(3) The payment of severance pay is necessary in order to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract, or is necessary to comply with a collective bargaining agreement.

(End of provision)

52.237-9 Waiver of Limitation on Severance Payments to Foreign Nationals.

As prescribed in 37.113-2(b), use the following clause:

**WAIVER OF LIMITATION ON SEVERANCE PAYMENTS
TO FOREIGN NATIONALS (OCT 1995)**

(a) Pursuant to 10 U.S.C. 2324(e)(3)(A) or 41 U.S.C. 256(e)(2)(A), as applicable, the cost allowability limitations in FAR 31.205-6(g)(3) are waived.

(b) This clause may be incorporated into subcontracts issued under this contract, if approved by the Contracting Officer.

PART 42

CONTRACT ADMINISTRATION

☞ When authorized by the contracting office, Contract Administration Offices evaluate contractor performance per Subpart 42.15.

42.302 Contract administration functions.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
* * * * *	* * * * *
(b) The CAO shall perform the following functions only when and to the extent specifically authorized by the contracting office: * * * * *	(b) The CAO shall perform the following functions only when and to the extent specifically authorized by the contracting office: * * * * *
	(11) Prepare evaluations of contractor performance in accordance with Subpart 42.15 [FAC 90-26]

☞ Past performance information is information that is relevant to future source selections on a contractor's actions under previously awarded contracts. Record information on such matters as the contractor's

- Record of conforming to contract requirements and to standards of good workmanship
- Record of forecasting and controlling costs.
- Adherence to contract schedules, including the administrative aspects of performance.
- History of reasonable and cooperative behavior and commitment to customer satisfaction.

Business-like concern in general for the interest of the customer. (FAR subpart 42.15, FAC 90-26)

☞ When work on the contract is completed, prepare an evaluation of contractor performance for each contract in excess of:

- \$1,000,000 beginning July 1, 1995,
- \$500,000 beginning July 1, 1996, and
- \$100,000 beginning January 1, 1998

Also prepare interim evaluations for multiple year contracts as specified by the agency.

Exceptions:

- Contracts awarded under Subparts 8.6 and 8.7
- Construction and A&E contracts (see §36.201 and 36.604 for policies on recording performance under such contracts).

(FAR subpart 42.15, FAC 90-26)

☞ Generally solicit input for the evaluations from the technical office, contracting office, and, where appropriate, end users of the product or service. (FAR subpart 42.15, FAC 90-26)

☞ Provide copies of the agency evaluation of the contractor's performance to the contractor as soon as practicable after completing the evaluation. Give the contractor at least 30 days to comment on the evaluation. If the parties disagree about the evaluation, refer the evaluation to a level above the contracting officer. However, the contracting agency makes the final decision. (FAR subpart 42.15, FAC 90-26)

☞ Retain copies of the evaluation, contractor response, and review comments (if any) and mark this information with the legend "Source Selection Information." Only release the evaluation to other Government personnel and the contractor whose performance is being evaluated. (FAR subpart 42.15, FAC 90-26)

☞ Destroy the evaluation within three years after completion of contract performance. (FAR subpart 42.15, FAC 90-26)

SUBPART 42.15—CONTRACTOR PERFORMANCE INFORMATION [added by FAC 90-26]

Sec.

42.1500 Scope of subpart.

42.1501 General.

42.1502 Policy.

42.1503 Procedures.

42.1500 Scope of subpart.

This subpart provides policies and establishes responsibilities for recording and maintaining contractor performance information. It implements Office of Federal Procurement Policy Letter 92-5, Past Performance Information. This subpart does not apply to procedures used by agencies in determining fees under award or incentive fee contracts. However, the fee amount paid to contractors should be reflective of the contractor's performance and the past performance evaluation should closely parallel the fee determinations.

42.1501 General.

Past performance information is relevant information, for future source selection purposes, regarding a contractor's actions under previously awarded contracts. It includes, for example, the contractor's record of conforming to contract requirements and to standards of good workmanship; the contractor's record of forecasting and controlling costs; the contractor's adherence to contract schedules, including the

administrative aspects of performance; the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor's business-like concern for the interest of the customer.

42.1502 Policy.

(a) Except as provided in paragraph (b) of this section, agencies shall prepare an evaluation of contractor performance for each contract in excess of \$1,000,000 beginning July 1, 1995, \$500,000 beginning July 1, 1996, and \$100,000 beginning January 1, 1998, (regardless of the date of contract award) at the time the work under the contract is completed. In addition, interim evaluations should be prepared as specified by the agencies to provide current information for source selection purposes, for contracts with a period of performance, including options, exceeding one year. This evaluation is generally for the entity, division, or unit that performed the contract. The content and format of performance evaluations shall be established in accordance with agency procedures and should be tailored to the size, content, and complexity of the contractual requirements.

(b) Agencies shall not evaluate performance for contracts awarded under Subparts 8.6 and 8.7. Agencies shall evaluate construction contractor performance and architect/engineer contractor performance in accordance with 36.201 and 36.604, respectively.

42.1503 Procedures.

(a) Agency procedures for the past performance evaluation system shall generally provide for input to the evaluations from the technical office, contracting office and, where appropriate, end users of the product or service.

(b) Agency evaluations of contractor performance prepared under this subpart shall be provided to the contractor as soon as practicable after completion of the evaluation. Contractors shall be given a minimum of 30 days to submit comments, rebutting statements, or additional information. Agencies shall provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. The ultimate conclusion on the performance evaluation is a decision of the contracting agency. Copies of the evaluation, contractor response, and review comments, if any, shall be retained as part of the evaluation. These evaluations may be used to support future award decisions, and should therefore be marked "Source Selection Information". The completed evaluation shall not be released to other than Government personnel and the contractor whose performance is being evaluated during the period the information may be used to provide source selection information. Disclosure of such information could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations. Evaluations used in determining award or incentive fee payments may also be used to satisfy the requirements of this subpart.

(c) Departments and agencies shall share past performance information with other departments and agencies when requested to support future award decisions. The information may be provided through interview and/or by sending the evaluation and comment documents to the requesting source selection official.

(d) Any past performance information systems, including automated systems, used for maintaining contractor performance information and/or evaluations should include appropriate management and technical controls to ensure that only authorized personnel have access to the data.

(e) The past performance information shall not be retained to provide source selection information for longer than three years after completion of contract performance.

✎ The FAR now requires that contracting officers use, not merely take into consideration, established final indirect cost rates in negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established. [§42.703-1, FAC 90-31, Case 94-754]

42.703-1 Policy.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>*****</p> <p>(c) Contracting officers shall—</p> <p>(1) Unless the quick-closeout procedure in 42.708 is used, use final indirect cost rates of a business unit for a given period, which shall be binding for all the cost-reimbursement contracts of the business unit for that period, subject to any specific limitation in a contract or advance agreement (when contracts of more than one agency are involved, see 42.101(c)); and</p> <p>(2) Take into consideration established final indirect cost rates in negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established (see 31.103(b)).</p>	<p>*****</p> <p>(c) Contracting officers shall—</p> <p>(1) Unless the quick-closeout procedure in 42.708 is used, use final indirect cost rates of a business unit for a given period, which shall be binding for all the cost-reimbursement contracts of the business unit for that period, subject to any specific limitation in a contract or advance agreement (when contracts of more than one agency are involved, see 42.101(c)); and</p> <p>(2) To ensure compliance with 10 U.S.C. 2324(a) and 41 U.S.C. 256(a), use established final indirect cost rates in negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established.</p>

✎ Section 42.703-2 extends requirements for contractor certification of indirect cost rates (both billing and final) to the civilian agencies. Pursuant to 10 U.S.C. 2324(h), the Department of Defense already determines or negotiates contractor indirect cost rates on the basis of a certified proposal. Basically, contracting officers may not agree to billing or final indirect cost rates unless the contractor has certified (using the clause at 52.242-4, Certification of Indirect Costs) that:

- All proposed costs are allowable
- None are unallowable, AND
- All costs included in the proposal are properly allocable to Government contracts on the basis of a beneficial or causal relationship between the expenses incurred and the contracts to which they are allocated in accordance with applicable acquisition regulations.

[§42.703-1 and 52.242-4, FAC 90-31, Case 94-752]

☞ The head of the agency or designee may waive the certification when in the interest of the United States. However, they must put the reasons for the waiver in writing and make those reasons available to the public. For example, waivers might be appropriate for contracts with foreign governments, international organizations, State or local governments subject to OMB circular A-87, educational institutions subject to OMB circular A-21, and non-profit organizations subject to OMB circular A-122. [§42.703-1, FAC 90-31, Case 94-752]

☞ If necessary for continuation of the contract, contracting officers can unilaterally establish the rates if the contractor fails to certify its proposal for billing or indirect cost rates. [§42.703-1, FAC 90-31, Case 94-752]

42.703-2 Certificate of indirect costs. [Added by FAC 90-31]

(a) *General.* In accordance with 10 U.S.C. 2324(h) and 41 U.S.C. 256(h), a proposal shall not be accepted and no agreement shall be made to establish billing rates or final indirect cost rates unless the costs have been certified by the contractor.

(b) *Waiver of certification.* (1) The agency head, or designee, may waive the certification requirement when—

(i) It is determined to be in the interest of the United States; and

(ii) The reasons for the determination are put in writing and made available to the public.

(2) A waiver may be appropriate for a contract with—

(i) A foreign government or international organization, such as a subsidiary body of the North Atlantic Treaty Organization;

(ii) A state or local government subject to OMB Circular A-87;

(iii) An educational institution subject to OMB Circular A-21; and

(iv) A nonprofit organization subject to OMB Circular A-122.

(c) *Failure to certify.* (1) If the contractor has not certified its proposal for billing rates or indirect cost rates and a waiver is not appropriate, the contracting officer shall unilaterally establish the rates if they are necessary for continuation of the contract.

(2) Rates established unilaterally should be—

(i) Based on audited historical data or other available data as long as unallowable costs are excluded; and

(ii) Set low enough to ensure that potentially unallowable costs will not be reimbursed.

(d) *False certification.* The contracting officer should consult with legal counsel to determine appropriate action when a contractor certificate of indirect costs is thought to be false.

(e) *Penalties for unallowable costs.* 10 U.S.C. 2324(a) through (d) and 41 U.S.C. 256(a) through (d) prescribe penalties for submission of unallowable costs in final indirect cost rate proposals (see 42.709 for penalties and contracting officer responsibilities).

(f) *Contract clause.* (1) Except as provided in paragraph (f)(2) of this subsection, the clause at 52.242-4, Certification of Indirect Costs, shall be incorporated into all solicitations and contracts which provide for—

(i) Interim reimbursement of indirect costs;

(ii) Establishment of final indirect cost rates; or

(iii) Contract financing that includes interim payment of indirect costs, *e.g.*, progress payments based on cost (Subpart 32.5) or progress payments based on percentage or stage of completion.

(2) The Department of Energy may provide an alternate clause in its agency supplement for its Management and Operating contracts.

52.242-4 Certification of Indirect Costs.

As prescribed in 42.703-2(f), insert the following clause:

CERTIFICATION OF INDIRECT COSTS (OCT 1995)

(a) The Contractor shall—

(1) Certify any proposal to establish or modify billing rates or to establish final indirect cost rates;

(2) Use the format in paragraph (c) of this clause to certify; and

(3) Have the certificate signed by an individual of the Contractor's organization at a level no lower than a vice president or chief financial officer of the business segment of the Contractor that submits the proposal.

(b) Failure by the Contractor to submit a signed certificate, as described in this clause, shall result in payment of indirect costs at rates unilaterally established by the Government.

(c) The certificate of indirect costs shall read as follows:

CERTIFICATE OF INDIRECT COSTS

This is to certify that to the best of my knowledge and belief:

1. I have reviewed this indirect cost proposal;

2. All costs included in this proposal (*identify proposal and date*) to establish billing or final indirect cost rates for (*identify period covered by rate*) are allowable in accordance with the requirements of contracts to which they apply and with the cost principles of the Federal Acquisition Regulation (FAR) and its supplements applicable to those contracts;

3. This proposal does not include any costs which are unallowable under applicable cost principles of the FAR or its supplements, including, but not limited to: advertising and public relations costs, contributions and donations, entertainment costs, fines and penalties, lobbying costs, defense of fraud proceedings, and goodwill; and

4. All costs included in this proposal are properly allocable to Government contracts on the basis of a beneficial or causal relationship between the expenses incurred and the contracts to which they are allocated in accordance with applicable acquisition regulations.

I declare under penalty of perjury that the foregoing is true and correct.

Firm: _____

Signature: _____

Name of Certifying Official: _____

Title: _____

Date of Execution: _____

(End of clause)

✋ If the contracting officer is responsible for determining final indirect cost rates, the FAR prohibits the contracting officer from resolving any questioned costs until obtaining—

- Adequate documentation on the costs; and
- The contract auditor's opinion on the allowability of the costs.

The FAR further advises contracting officers, whenever possible, to invite the contract auditor to serve as an advisor at any negotiation or meeting with the contractor on the determination of the contractor's final indirect cost rates.

Finally, the FAR adds a specific requirement that the contracting officer notify the contractor of the individual costs which were considered unallowable and the respective amounts of the disallowance. [§42.705-1, FAC 90-31, Case 94-754]

42.705-1 Contracting officer determination procedure.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>*****</p> <p>(b) <i>Procedures.</i> (1) In accordance with the Allowable Cost and Payment clause at 52.216-7 or 52.216-13, the contractor shall submit to the contracting officer and, if required by agency procedures, to the cognizant auditor a final indirect cost rate proposal reflecting actual cost experience during the covered period, together with supporting cost or pricing data.</p> <p>(2) The auditor shall submit to the contracting officer an advisory audit report (i) identifying any relevant advance agreements or restrictive terms of specific contracts and (ii) including the information required by 15.805-5(e).</p> <p>(3) The contracting officer shall head the Government negotiating team, which includes the cognizant auditor and technical or functional personnel as required. Contracting offices having significant dollar interest shall be invited to participate in the negotiation and in the preliminary discussion of critical issues. Individuals or offices that have provided a significant input to the Government position should be invited to attend.</p> <p>(4) The Government negotiating team shall develop a negotiation position.</p> <p>(5) The cognizant contracting officer shall—</p> <p>(i) Conduct negotiations;</p> <p>(ii) Prepare a written indirect cost rate agreement conforming to the requirements of the contracts;</p>	<p>*****</p> <p>(b) <i>Procedures.</i> (1) In accordance with the Allowable Cost and Payment clause at 52.216-7 or 52.216-13, the contractor shall submit to the contracting officer and, if required by agency procedures, to the cognizant auditor a final indirect cost rate proposal reflecting actual cost experience during the covered period, together with supporting cost or pricing data.</p> <p>(2) The auditor shall submit to the contracting officer an advisory audit report (i) identifying any relevant advance agreements or restrictive terms of specific contracts and (ii) including the information required by 15.805-5(e).</p> <p>(3) The contracting officer shall head the Government negotiating team, which includes the cognizant auditor and technical or functional personnel as required. Contracting offices having significant dollar interest shall be invited to participate in the negotiation and in the preliminary discussion of critical issues. Individuals or offices that have provided a significant input to the Government position should be invited to attend.</p> <p>(4) The Government negotiating team shall develop a negotiation position. Pursuant to 10 U.S.C. 2324(f) and 41 U.S.C. 256(f), the contracting officer shall—</p> <p>(i) Not resolve any questioned costs until obtaining—</p>

(iii) Prepare, sign, and place in the contractor general file (see 4.801(c)(3)) a negotiation memorandum covering (A) the disposition of significant matters in the advisory audit report, (B) reconciliation of all costs questioned, with identification of items and amounts allowed or disallowed in the final settlement as well as the disposition of period costing or allocability issues, (C) reasons why any recommendations of the auditor or other Government advisors were not followed, and (D) identification of cost or pricing data submitted during the negotiations and relied upon in reaching a settlement; and

(iv) Distribute resulting documents in accordance with 42.706.

(A) Adequate documentation on the costs; and

(B) The contract auditor's opinion on the allowability of the costs.

(ii) Whenever possible, invite the contract auditor to serve as an advisor at any negotiation or meeting with the contractor on the determination of the contractor's final indirect cost rates.

(5) The cognizant contracting officer shall—

(i) Conduct negotiations;

(ii) Prepare a written indirect cost rate agreement conforming to the requirements of the contracts;

(iii) Prepare, sign, and place in the contractor general file (see 4.801(c)(3)) a negotiation memorandum covering (A) the disposition of significant matters in the advisory audit report, (B) reconciliation of all costs questioned, with identification of items and amounts allowed or disallowed in the final settlement as well as the disposition of period costing or allocability issues, (C) reasons why any recommendations of the auditor or other Government advisors were not followed, and (D) identification of cost or pricing data submitted during the negotiations and relied upon in reaching a settlement; and

(iv) Distribute resulting documents in accordance with 42.70.

(v) Notify the contractor of the individual costs which were considered unallowable and the respective amounts of the disallowance.

☞ Sections 2101 and 2151 of the Federal Acquisition Streamlining Act of 1994 change the contract value threshold for assessment of penalties on unallowable costs from \$100,000 to \$500,000 and expand the coverage from the Department of Defense to all executive agencies. With the exception of the threshold value, the penalty provisions in the new law are the same as those implemented in the current Defense Federal Acquisition Regulation Supplement. [§42.709 and 52.242-3, FAC 90-31, Case 94-751]

☞ Contracting officers may assess penalties against contractors for including unallowable indirect costs in—

- Final indirect cost rate proposals; or

- The final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract.

However, this policy only applies to contracts in excess of \$500,000 — and does NOT apply to fixed-price contracts without cost incentives or any firm-fixed-price contracts for the purchase of commercial items. [§42.709 and 52.242-3, FAC 90-31, Case 94-751]

✋ The penalty is equal to the amount of the disallowed costs plus interest on the paid portion, if any, of the disallowance. However, if the indirect cost was determined to be unallowable for that contractor before proposal submission, the penalty is double that amount. Any of the following may constitute evidence of prior determinations of unallowability:

- A DCAA Form 1, Notice of Contract Costs Suspended and/or Disapproved (see 48 CFR 242.705-2), or any similar notice which the contractor elected not to appeal and was not withdrawn by the cognizant Government agency.
- A contracting officer final decision which was not appealed.
- A prior executive agency Board of Contract Appeals or court decision involving the contractor, which upheld the cost disallowance.
- A determination or agreement of unallowability under 31.201-6.

[§42.709 and 52.242-3, FAC 90-31, Case 94-751]

✋ Determinations of penalty amounts under paragraphs (d) and (e) of the clause at 52.242-3 are final decisions within the meaning of the Contract Disputes Act of 1978. The FAR contains precise instructions for determining the amount of the interest, issuing assessments, and waiving the penalty. [§42.709 and 52.242-3, FAC 90-31, Case 94-751]

42.709 Scope.

(a) This section implements 10 U.S.C. 2324(a) through (d) and 41 U.S.C. 256(a) through (d). It covers the assessment of penalties against contractors which include unallowable indirect costs in—

(1) Final indirect cost rate proposals; or

(2) The final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract.

(b) This section applies to all contracts in excess of \$500,000, except fixed-price contracts without cost incentives or any firm-fixed-price contracts for the purchase of commercial items.

42.709-1 General.

(a) The following penalties apply to contracts covered by this section:

(1) If the indirect cost is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the allowability of specific selected costs, the penalty is equal to—

(i) The amount of the disallowed costs allocated to contracts that are subject to this section for which an indirect cost proposal has been submitted; plus

(ii) Interest on the paid portion, if any, of the disallowance.

(2) If the indirect cost was determined to be unallowable for that contractor before proposal submission, the penalty is two times the amount in paragraph (a)(1)(i) of this section.

(b) These penalties are in addition to other administrative, civil, and criminal penalties provided by law.

(c) It is not necessary for unallowable costs to have been paid to the contractor in order to assess a penalty.

42.709-2 Responsibilities.

(a) The cognizant contracting officer is responsible for—

- (1) Determining whether the penalties in 42.709-1(a) should be assessed;
- (2) Determining whether such penalties should be waived pursuant to 42.709-5; and
- (3) Referring the matter to the appropriate criminal investigative organization for review and for appropriate coordination of remedies, if there is evidence that the contractor knowingly submitted unallowable costs.

(b) The contract auditor, in the review and/or the determination of final indirect cost proposals for contracts subject to this section, is responsible for—

- (1) Recommending to the contracting officer which costs may be unallowable and subject to the penalties in 42.709-1(a);
- (2) Providing rationale and supporting documentation for any recommendation; and
- (3) Referring the matter to the appropriate criminal investigative organization for review and for appropriate coordination of remedies, if there is evidence that the contractor knowingly submitted unallowable costs.

42.709-3 Assessing the penalty.

Unless a waiver is granted pursuant to 42.709-5, the cognizant contracting officer shall—

(a) Assess the penalty in 42.709-1(a)(1), when the submitted cost is expressly unallowable under a cost principle in the FAR or an executive agency supplement that defines the allowability of specific selected costs; or

(b) Assess the penalty in 42.709-1(a)(2), when the submitted cost was determined to be unallowable for that contractor prior to submission of the proposal. Prior determinations of unallowability may be evidenced by—

(1) A DCAA Form 1, Notice of Contract Costs Suspended and/or Disapproved (see 48 CFR 242.705-2), or any similar notice which the contractor elected not to appeal and was not withdrawn by the cognizant Government agency;

(2) A contracting officer final decision which was not appealed;

(3) A prior executive agency Board of Contract Appeals or court decision involving the contractor, which upheld the cost disallowance; or

(4) A determination or agreement of unallowability under 31.201-6.

(c) Issue a final decision (see 33.211) which includes a demand for payment of any penalty assessed under paragraph (a) or (b) of this section. The letter shall state that the determination is a final decision under the Disputes clause of the contract. (Demanding payment of the penalty is separate from demanding repayment of any paid portion of the disallowed cost.)

42.709-4 Computing interest.

For 42.709-1(a)(1)(ii), compute interest on any paid portion of the disallowed cost as follows:

(a) Consider the overpayment to have occurred, and interest to have begun accumulating, from the midpoint of the contractor's fiscal year. Use an alternate equitable method if the cost was not paid evenly over the fiscal year.

(b) Use the interest rate specified by the Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat. 97).

(c) Compute interest from the date of overpayment to the date of the demand letter for payment of the penalty.

(d) Determine the paid portion of the disallowed costs in consultation with the contract auditor.

42.709-5 Waiver of the penalty.

The cognizant contracting officer shall waive the penalties at 42.709-1(a) when—

(a) The contractor withdraws the proposal before the Government formally initiates an audit of the proposal and the contractor submits a revised proposal (an audit will be deemed to be formally initiated when the Government provides the contractor with written notice, or holds an entrance conference, indicating that audit work on a specific final indirect cost proposal has begun);

(b) The amount of the unallowable costs under the proposal which are subject to the penalty is \$10,000 or less (i.e., if the amount of expressly or previously determined unallowable costs which would be allocated to the contracts specified in 42.709(b) is \$10,000 or less); or

(c) The contractor demonstrates, to the cognizant contracting officer's satisfaction, that—

(1) It has established policies and personnel training and an internal control and review system that provide assurance that unallowable costs subject to penalties are precluded from being included in the contractor's final indirect cost rate proposals (e.g., the types of controls required for satisfactory participation in the Department of Defense sponsored self-governance programs, specific accounting controls over indirect costs, compliance tests which demonstrate that the controls are effective, and Government audits which have not disclosed recurring instances of expressly unallowable costs); and

(2) The unallowable costs subject to the penalty were inadvertently incorporated into the proposal; i.e., their inclusion resulted from an unintentional error, notwithstanding the exercise of due care.

42.709-6 Contract clause.

Use the clause at 52.242-3, Penalties for Unallowable Costs, in all solicitations and contracts over \$500,000 except fixed-price contracts without cost incentives or any firm-fixed-price contract for the purchase of commercial items. Generally, covered contracts are those which contain one of the clauses at 52.216-7, 52.216-13, 52.216-16, or 52.216-17, or a similar clause from an executive agency's supplement to the FAR.

52.242-3 Penalties for Unallowable Costs.

As prescribed in 42.709-6, use the following clause:

PENALTIES FOR UNALLOWABLE COSTS (OCT 1995)

(a) *Definition.* *Proposal*, as used in this clause, means either—

(1) A final indirect cost rate proposal submitted by the Contractor after the expiration of its fiscal year which—

(i) Relates to any payment made on the basis of billing rates; or

(ii) Will be used in negotiating the final contract price; or

(2) The final statement of costs incurred and estimated to be incurred under the Incentive Price Revision clause (if applicable), which is used to establish the final contract price.

(b) Contractors which include unallowable indirect costs in a proposal may be subject to penalties. The penalties are prescribed in 10 U.S.C. 2324 or 41 U.S.C. 256, as applicable, which is implemented in Section 42.709 of the Federal Acquisition Regulation (FAR).

(c) The Contractor shall not include in any proposal any cost which is unallowable, as defined in Part 31 of the FAR, or an executive agency supplement to Part 31 of the FAR.

(d) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the allowability of specific selected costs, the Contractor shall be assessed a penalty equal to—

(1) The amount of the disallowed cost allocated to this contract; plus

(2) Simple interest, to be computed—

(i) On the amount the Contractor was paid (whether as a progress or billing payment) in excess of the amount to which the Contractor was entitled; and

(ii) Using the applicable rate effective for each six-month interval prescribed by the Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat. 97).

(e) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal includes a cost previously determined to be unallowable for that Contractor, then the Contractor will be assessed a penalty in an amount equal to two times the amount of the disallowed cost allocated to this contract.

(f) Determinations under paragraphs (d) and (e) of this clause are final decisions within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601, et seq.).

(g) Pursuant to the criteria in FAR 42.709-5, the Contracting Officer may waive the penalties in paragraph (d) or (e) of this clause.

(h) Payment by the Contractor of any penalty assessed under this clause does not constitute repayment to the Government of any unallowable cost which has been paid by the Government to the Contractor.

PART 45

✎ Contractors may electronically reproduce standard inventory schedule forms, as long as they make no change to the name, content, or sequence of the data elements. Check to ensure that the electronic reproduction includes all essential elements of data and is signed. (§45.606-5, FAC 90-29, 91-104)

45.606-5 Instructions for preparing and submitting schedules of contractor inventory.

* * * * *

(b) *Submission.*

(1) Contractors shall report contractor inventory promptly after determining it to be excess, unless a later date is authorized by the contract or the plant clearance officer.

(2) Unless contract provisions or agency regulations prescribe otherwise, 12 copies of inventory schedules listing serviceable or salvable items and 6 copies of inventory schedules listing scrap items shall be presented to the plant clearance officer at the cognizant contract administration office.

(3) The standard inventory schedule forms may be reproduced by contractors, provided no change is made in size or format. ~~Machine listings may be submitted if all essential elements of data are included and the appropriate signed standard form is submitted as a cover sheet.~~

(4) The appropriate continuation sheet shall be used when more than one page is needed.

(5) Partial schedules may be submitted when they cover substantial portions of a particular property classification of contractor inventory. The first page of each schedule submitted shall be identified as partial or final in the title block of the schedule.

(6) The contractor should consult with the plant clearance officer when in doubt as to item descriptions or other inventory schedule requirements.

* * * * *

(b) *Submission.*

(1) Contractors shall report contractor inventory promptly after determining it to be excess, unless a later date is authorized by the contract or the plant clearance officer.

(2) Unless contract provisions or agency regulations prescribe otherwise, 12 copies of inventory schedules listing serviceable or salvable items and 6 copies of inventory schedules listing scrap items shall be presented to the plant clearance officer at the cognizant contract administration office.

(3) The standard inventory schedule forms may be **electronically** reproduced by contractors **pursuant to 53.105**, provided no change is made **to the name, content or sequence of the data elements**. All essential elements of data **must be** included and the **form must be signed**. [FAC 90-29]

(4) The appropriate continuation sheet shall be used when more **space** is needed. [FAC 90-29]

(5) Partial schedules may be submitted when they cover substantial portions of a particular property classification of contractor inventory. The first page of each schedule submitted shall be identified as partial or final in the title block of the schedule.

(6) The contractor should consult with the plant clearance officer when in doubt as to item descriptions or other inventory schedule requirements.

PART 51

USE OF GOVERNMENT SOURCES BY CONTRACTORS

☞ Nonprofit agencies for the blind or severely disabled may use Government supply sources in performing contracts under the Javits-Wagner-O'Day Act, if:

- The nonprofit agency requesting use of the supplies and services is providing a commodity or service to the Federal Government, and
- The supplies or services received are directly used in making or providing a commodity or service approved by the Committee for Purchase From People Who Are Blind or Severely Disabled to the Federal Government (FAC 90-31, 94-701).

51.101 Policy.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
<p>(a) If it is in the Government's interest, and if supplies or services required in the performance of a Government contract are available from Government supply sources, contracting officers may authorize contractors to use these sources in performing—</p> <p>(1) Government cost-reimbursement contracts;</p> <p>or</p> <p>(2) Other types of negotiated contracts when the agency determines that a substantial dollar portion of the contractor's contracts are of a Government cost-reimbursement nature.</p>	<p>(a) If it is in the Government's interest, and if supplies or services required in the performance of a Government contract are available from Government supply sources, contracting officers may authorize contractors to use these sources in performing—</p> <p>(1) Government cost-reimbursement contracts;</p> <p>(2) Other types of negotiated contracts when the agency determines that a substantial dollar portion of the contractor's contracts are of a Government cost-reimbursement nature; or</p> <p>(3) A contract under the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.) if:</p> <p>(i) the nonprofit agency requesting use of the supplies and services is providing a commodity or service to the Federal Government, and</p> <p>(ii) the supplies or services received are directly used in making or providing a commodity or service approved by the Committee for Purchase From People Who Are Blind or Severely Disabled to the Federal Government (See Subpart 8.7).</p>

51.102 Authorization to use Government supply sources.

(a) Before issuing an authorization to a contractor to use Government supply sources, the contracting officer shall place in the contract file a written finding supporting issuance of the authorization. The determination shall be based on, but not limited to, considerations of the following factors:

- (1) The administrative cost of placing orders with Government supply sources and the program impact of delay factors, if any.
- (2) The lower cost of items available through Government supply sources.
- (3) Suitability of items available through Government supply sources.
- (4) Delivery factors such as cost and time.
- (5) Recommendations of the contractor.

(a) Before issuing an authorization to a contractor to use Government supply sources, the contracting officer shall place in the contract file a written finding supporting issuance of the authorization. **Except for findings under 51.101(a)(3)**, the determination shall be based on, but not limited to, considerations of the following factors:

- (1) The administrative cost of placing orders with Government supply sources and the program impact of delay factors, if any.
- (2) The lower cost of items available through Government supply sources.
- (3) Suitability of items available through Government supply sources.
- (4) Delivery factors such as cost and time.
- (5) Recommendations of the contractor



PART 53

FORMS

✎ Agencies and the public may both computer generate standard and optional forms prescribed by the FAR if:

- The form is in an electronic format that complies with Federal Information Processing Standard Number 161, or
- There is no change to the name, content, or sequence of the data elements, and the form carries the Standard or Optional Form number and edition date. (¶52.105, FAC 90-29, 91-104).

53.105 Computer generation.

(a) Agencies may computer-generate the standard and optional forms prescribed in the FAR without exception approval (see 53.103), providing there is no change to the name, content, or sequence of the data elements, and the form carries the standard or optional form number and edition date. ~~Agencies shall notify the FAR Secretariat of their decisions to computer-generate forms prescribed by the FAR.~~

(b) The forms prescribed by this regulation may be computer generated by the public. Unless prohibited by agency regulations, forms prescribed by agency FAR supplements may also be computer generated by the public. Computer generated forms shall not change the name, content, or sequence of the data elements, and shall carry the Standard or Optional Form or agency number and edition date (see 53.111).

(a) Agencies may computer-generate the Standard and Optional Forms prescribed in the FAR without exception approval (see 53.103), provided— **(1) the form is in an electronic format that complies with Federal Information Processing Standard Number 161;** or (2) there is no change to the name, content, or sequence of the data elements, and the form carries the Standard or Optional Form number and edition date.

(b) The forms prescribed by this Part may be computer generated by the public. Unless prohibited by agency regulations, forms prescribed by agency FAR supplements may also be computer generated by the public. Computer generated forms shall **either comply with Federal Information Processing Standard Number 161** or shall retain the name, content, or sequence of the data elements, and shall carry the Standard or Optional Form or agency number and edition date (see 53.111).
